LIBRARY
SUPREME COURT, U. S.

FILED
APR 8 1969
JOHN F. DAVIS, CLERK

NO. 1239

IN THE

Supreme Court of the United States

October Term, 1968

YOUNG & COMPANY, ET AL, *Petitioners*

v.

R. J. SHEA, DEPUTY
COMMISSIONER OF LABOR, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

E. D. VICKERY
GUS A. SCHILL, JR.
Counsel for Petitioners

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
That Part of the Constitution and Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	10
Argument	12
Reason One	12
Reason Two	21
Reason Three	23
Reason Four	29
Conclusion	32
Certificate of Service	33
Appendix A:	
Deputy Commissioner's Order	1A
Appendix B:	
District Court's Docket Entry	1B
Appendix C:	
United States Court of Appeals for the Fifth Circuit's First Opinion	1C
United States Court of Appeals for the Fifth Circuit's Second Opinion	9C
United States Court of Appeals for the Fifth Circuit's Third Opinion	11C
United States Court of Appeals for the Fifth Circuit's Fourth Opinion	15C

Page

Appendix D:

Constitution and Statutes Involved 1D

Appendix E:

Excerpts from the Legislative History Covering the Administrative Procedure Act 1E

LIST OF AUTHORITIES

CASES Page

American Cyanamid Co. v. F.T.P., 6 Cir. 1966, 363 F.2d 757, at pp. 763-764 18

Amos Treat & Co. v. Securities and Exchange Commission, D.C. Cir. 1962, 306 F.2d 260, at pp. 263, 264, 267 18

Atlantic & Gulf Stevedores, Inc. v. Donovan, in 5 Cir. 1960, 274 F.2d 794, at pp. 799-800 .. 17

Calbeck v. Strachan Shipping Co., 5 Cir. 1962, 306 F.2d 693, affirming Strachan Shipping Co. v. Calbeck, D.C. Tex. 1961, 190 F. Supp. 255, at p. 260, cert. denied 372 U.S. 954, 9 L.Ed. 2d 978, 83 S.Ct. 950 (1963) 11, 24

Harvey Aluminum (Inc.) v. N.L.R.B., 9 Cir. 1964, 335 F.2d 749, at p. 753 18

Hornsby v. Allen, 5 Cir. 1964, 326 F.2d 605, at p. 608 19

In Re Murchison, 349 U.S. 133, at p. 136, 99 L.Ed. 942, at p. 946, 75 S.Ct. 623, 625 (1955) 16, 18

John W. McGrath Corp. v. Hughes, 2 Cir. 1959, 264 F.2d 314, at p. 316 ..... 11, 24, 28

Local No. 3, United Packinghouse Workers of America v. N.L.R.B., 8 Cir. 1954, 210 F.2d 325, at p. 330 18

CASES

	Page
N.L.R.B. v. Miami Coca Cola Bottling Co., 5 Cir. 1955, 222 F.2d 341, at p. 345	19
N.L.R.B. v. National Paper Co., 5 Cir. 1954, 216 F.2d 859, at p. 868	18
N.L.R.B. v. Phelps, 5 Cir. 1943, 136 F.2d 562, at p. 564	19
O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 95 L.Ed. 483, 71 S.Ct. 470 (1951)	16
Permian Basin Area Rate, 390 U.S. 747, 20 L.Ed.2d 312, at p. 346, 88 S.Ct. 1344 (1968)	16
Russell-Newman Mfg. Co. v. N.L.R.B., 5 Cir. 1966, 370 F.2d 980, at p. 984	19
Southern Pacific Co. v. Sheppeard, 5 Cir. 1940, 112 F.2d 147, at p. 148	21
Southern Stevedoring Co. v. Voris, 5 Cir. 1951, 190 F.2d 275, at p. 277	19
Strachan Shipping Co. v. Calbeck, 190 F.Supp. 255, 260 (S.D. Texas, 1961), affirmed at 306 F.2d 693 (5th Cir. 1962), sub nom Calbeck v. Strachan Shipping Co., cert. denied 372 U.S. 954, 83 S.Ct. 950, 9 L.Ed.2d 978 (1963)	25
Swift & Co. v. United States, 7 Cir. 1962, 308 F.2d 849, at p. 851	18
Tugwell v. A. F. Klaveness & Co., 5 Cir. 1963, 320 F.2d 866, cert. denied, 376 U.S. 951, 84 S.Ct. 967, 11 L.Ed.2d 970 (1964)	5
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, at p. 477, 95 L.Ed. 456, at p. 462, 71 S.Ct. 456 (1951)	11, 26, 27, 28
Wasson v. Trowbridge, 2 Cir. 1967, 382 F.2d 807, at p. 813	17
Welch v. Leavey, 5 Cir. 1968, 397 F.2d 189, cert. denied Jan. 20, 1969 (37 Law Week 3262)	6
Wong Yang Sung v. McGrath, 339 U.S. 33, at p. 50, 94 L.Ed. 616, at p. 628, 70 S.Ct. 445 (1950)	16

Page

CONSTITUTION OF THE UNITED STATES

Fifth Amendment 4, 9, 11, 13, 14, 30, 31, 32

UNITED STATES STATUTES

5 U.S.C.A. 556(b) 9, 22
5 U.S.C.A. 556(d) 23
33 U.S.C.A. Sec. 556(a-e) 4
33 U.S.C.A. Sec. 914(b) 9
33 U.S.C.A. Sec. 914(h) 4, 22
33 U.S.C.A. Sec. 920 4
33 U.S.C.A. Sec. 923(a) 4, 22

NO._____

IN THE

Supreme Court of the United States

October Term, 1968

YOUNG & COMPANY, ET AL, *Petitioners*

v.

R. J. SHEA, DEPUTY COMMISSIONER OF LABOR, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit initially rendered in the above entitled case.

OPINIONS BELOW

The Compensation Order issued under the Longshoremen's Act by Gerald Leavey, Deputy Commissioner, Bureau of Employees' Compensation, Eighth Compensation District is unreported but is printed as Appendix A

to this petition, *infra,* pages 1A-5A. The docket entry and order of the United States District Court for the Southern District of Texas, Houston Division, is unreported also but is printed as Appendix B to this petition, *infra,* pages 1B and 2B. The opinion of the United States Court of Appeals for the Fifth Circuit, as modified on rehearing, is reported at 397 F.2d 185[1] and its opinion on Joint Petition for Rehearing En Banc is reported at 404 F.2d 1059.[2] In order that the Court may have a complete record of the opinions and orders of the Court of Appeals below they are printed in Appendix C as follows:

1. The original opinion, dated July 10, 1968, *infra,* pages 1C-8C.
2. The opinion denying the First Petition for Rehearing except for modifications in the original opinion, dated August 19, 1968, *infra,* pages 9C and 10C.
3. The opinion denying with explanations a Joint Motion for Rehearing En Banc, dated December 9, 1968, *infra,* pages 11C-14C.
4. The opinion denying the Second Petition for Rehearing, dated December 12, 1968, *infra,* page 15C.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on July 10, 1968; however, three subsequent

1. The opinion is set forth as Appendix C to this petition, *infra,* pages 1C-8C, and can also be found at page 63 of the Record.

2. The opinion is set forth as Appendix C to this petition, *infra,* pages 11C-15C, and can also be found at page 208 of the Record.

orders were entered, two overruling Petitioners' First and Second Petitions for Rehearing and one overruling their Joint Motion for Rehearing En Banc. The First and Second Petitions for Rehearing were denied on August 19, 1968 and December 12, 1968, and the Joint Motion for Rehearing En Banc was denied on December 9, 1968. This Court by order of March 6, 1969, granted Petitioners' Motion for an Extension of Time up to and including April 11, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Sec. 1254 (1).

QUESTIONS PRESENTED

1.

Does the due process clause of the Fifth Amendment entitle Petitioners to a fair hearing and an impartial trier of the facts in an administrative hearing which adjudicates their rights under the Longshoremen's & Harbor Workers' Compensation Act and the Administrative Procedure Act?

Shockingly enough the Court of Appeals below held Petitioners are not entitled to an impartial trier of the facts when it completely disregarded the due process clause in holding that a Deputy Commissioner is not required to impartially decide the issues but instead operates under an alleged "statutory policy that all doubtful fact questions are to be resolved in favor of" the longshoreman-employee and against the Petitioners, his employer and its compensation carrier.[3]

2.

If the due process clause does not entitle Petitioners to an impartial trier of the facts, does the alleged "statu-

3. See full discussion, *infra*, pages 12 to 21.

tory policy" of partiality actually exist under the Longshoremen's Act and the Administrative Procedure Act?[4]

3.

Is the burden of proof on doubtful fact questions in administrative hearings under the Longshoremen's Act and the Administrative Procedure Act substantially less than the burden of proof on precisely the same doubtful fact questions in a jury trial in federal court?[5]

THAT PART OF THE CONSTITUTION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States (Appendix D, *infra,* page 1D).

2. Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C.A., Secs. 914(h), 920 and 923(a), (Appendix D, *infra,* pages 1D-3D).

3. The Administrative Procedure Act as amended, 5 U.S.C.A., Sec. 556 (a-e). (Appendix D, *infra,* pages 4D-5D). The pertinent legislative history of the Administrative Procedure Act is printed in Appendix E, *infra,* pages 1E-15E.

STATEMENT OF THE CASE

Paul Tugwell (hereafter sometimes referred to as the longshoreman or the employee) was allegedly injured while working as a longshoreman aboard the M/S PLEASANTVILLE on July 12, 1958 while in the employ of Young & Company (hereafter referred to as the em-

4. See full discussion, *infra,* pages 21 to 23.

5. See full discussion, *infra,* pages 23 to 29.

ployer). He initially instituted an action against the owner of the vessel alleging that he slipped and fell on the deck of the M/S PLEASANTVILLE because of the negligence of its owner and/or the unseaworthiness of the vessel. The employer was impleaded as a third party defendant by the vessel, and after a lengthy trial during which the issue was vigorously disputed, the jury was asked the following special interrogatory:

> "Did the Plaintiff, Paul L. Tugwell, sustain an injury by slipping and falling upon the deck of the M/S PLEASANTVILLE during the early morning hours of July 12, 1958?"

To this interrogatory the jury answered "No".[6]

Because the jury had found that he did not sustain an injury aboard the vessel, the trial court entered a judgment that the employee was not entitled to recover from the third party vessel owner. The employee then filed an appeal, and the Court of Appeals below affirmed the jury finding and the trial court's judgment sub. nom. *Tugwell v. A. F. Klaveness & Company,* 5 Cir. 1963, 320 F.2d 866, and this Court denied certiorari, 376 U.S. 951, 84 S.Ct. 967, 11 L.Ed.2d 970 (1964).

As he was entitled to do under the Longshoremen's Act, the employee thereafter sought to recover additional compensation benefits from the Petitioners herein, the stevedore-employer and its workmen's compensation carrier (hereafter referred to as the compensation carrier). The stevedore-employer and its compensation carrier moved that the compensation claim be dismissed on the ground that the employee was estopped from re-litigating

6. Record, pages 10-11.

the issue of whether or not he had sustained an injury aboard the vessel. The Deputy Commissioner administering the Longshoremen's Act set the compensation claim for hearing, and after the same vigorously disputed trial of the same injury issue found as a fact that on July 12, 1958,

> ". . . the claimant (Tugwell), while performing service as a longshoreman for the employer aboard the M/S PLEASANTVILLE . . . sustained an injury resulting in disability. While tightening a guy line he slipped and fell on the deck of the vessel causing injury. . . . (Parenthetical expression added.)[7]

The Deputy Commissioner in the same order found without any explanation that the doctrine of collateral estoppel was "inapplicable and should not prevent the claimant from pursuing his claim for compensation under the Longshoremen's and Harbor Workers' Act."[8]

All parties to the compensation proceeding appealed from the Deputy Commissioner's Order. The employee, Tugwell, because the Deputy Commissioner found that he was not entitled to further benefits and the employee's appeal has now been terminated upon this Court's denial of his Petition for a Writ of Certiorari with the Deputy Commissioner's Order having been affirmed.[9] The stevedore-employer and its compensation carrier appealed because the doctrine of collateral estoppel was held to

---

7. Record, page 14; Appendix A, *infra,* page 1A.

8. Record, pages 16-17; Appendix A, *infra,* pages 3A-4A.

9. Tugwell's appeal is reported sub nom *Welch v. Leavey,* 5 Cir. 1968, 397 F.2d 189, with the petition for writ of certiorari being denied by this Court under No. 757 on January 20, 1969 (37 Law Week 3262).

be inapplicable. The District Court had jurisdiction pursuant to 33 U.S.C.A. Sec. 921(b), and in a somewhat abbreviated docket entry affirmed the Deputy Commissioner's ruling on the collateral estoppel issue.[10] An appeal was thereafter taken by Petitioners to the Court of Appeals for the Fifth Circuit on that issue, and their appeal was treated in separate opinions on the collateral estoppel issue by that Court.[11]

In its initial opinion, the Court of Appeals below expresly found that "the same fact question was clearly decided in the prior suit" against the vessel, that "the question of whether there was an injury" was "common to both" the suit against the vessel and the claim for compensation under the Longshoremen's Act, and that "the issue decided by the Commissioner was the same one determined by the jury."[12]

Thus on precisely the same fact question—did the employee sustain an injury on the M/S PLEASANTVILLE—and after considering the same disputed evidence, the jury first found that he did not sustain an injury and the Deputy Commissioner found that he did.

---

10. Appendix B, *infra*, page 1B. The trial court's order affirming the Deputy Commissioner's Order is set forth at Record, pages 54 and 55; Appendix B, *infra*, page 2B.

11. The initial opinion as corrected is published at 397 F.2d 185 with the opinion denying the Joint Motion for Rehearing En Banc being found at 404 F.2d 1059. The original opinion, dated July 10, 1968 is set forth at Appendix C, *infra*, pages 1C-8C; the opinion denying the First Petition for Rehearing with modifications to the original opinion is set forth at Appendix C, *infra*, pages 9C-10C; the opinion denying a Joint Motion for Rehearing En Banc, dated December 9, 1968 is reproduced in Appendix C, *infra*, pages 11C-14C, and the opinion denying the Second Petition for Rehearing, dated December 12, 1968 is found at Appendix C, *infra*, page 15C.

12. 397 F.2d 185, 188; Appendix C, *infra*, page 5C.

However the Court of Appeals below held that the doctrine of collateral estoppel did not apply because of its clearly erroneous belief:

1. ". . . that in considering the proof offered by the parties the (Deputy) Commissioner operates under a statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee. . . ." (Parenthetical expression added)[13]

and

2. That because of this alleged "statutory policy"[14] that there is a "substantial variance in the standard of proof required to establish facts before the Commissioner and the jury."[15]

In their Second Petition for Rehearing and their Joint Motion for Rehearing En Banc, Petitioners affirmatively asserted:

---

13. 397 F.2d 185, 188; Appendix C, *infra*, pages 6C and 9C.

14. In its original opinion the Court of Appeals below denominated this as an "administrative policy" rather than as a "statutory policy" as it appears in the opinion as modified on First Petition for Rehearing. This change from an alleged "administrative policy" had to be made, because no such "administrative policy" actually existed. And even if it had existed, it could not have been used by the Court in this case against these Petitioners because no such "administrative policy" had been published in the Federal Register as required by the Administrative Procedure Act (5 U.S.C.A. 552 (1) (D) and (E). Upon realizing that their "policy of partiality" could not be sustained on the basis of their alleged "administrative policy", the Court of Appeals below modified its original opinion to make this an alleged "statutory policy", but without in any way indicating the statute to which it referred until it wrote once again on Petitioners' Joint Motion for Rehearing. As demonstrated hereafter, no such "statutory policy" exists either. See full discussion, *infra*, pages 21 tho 23.

15. 397 F.2d 185, 188; Appendix C, *infra*, page 6C.

1. That there was no "statutory policy" which either expressly or by implication, directed the Deputy Commissioner that "all doubtful fact questions are to be resolved in favor of the injured employee."

and

2. That no such "policy" of partiality could constitutionally exist, whether by statute or adminstrative fiat or judicial decree, because it would deprive Petitioners of law guaranteed to them by the Fifth Amendment to the Constitution of the United States. This for the simple reason that both the Longshoremen's Act and the Administrative Procedure Act require the Deputy Commissioners to conduct their hearings and decide the issues "in an impartial manner"[16] and in such a way as "will properly protect the rights of all parties."[17]

In its opinion on Joint Motion for Rehearing En Banc, the Court of Appeals below apparently broadened its concept of the "statutory policy" of the Longshoremen's Act when it stated that not only "all doubtful fact questions" but rather that "all doubtful questions are to be resolved in favor of the longshoreman." It thus brought both doubtful fact and law questions under its "statutory policy" of partiality.

The Court of Appeals below apparently could not bring itself to hold that its alleged "statutory policy" of partiality preserved to the employer and its compensation carrier their Fifth Amendment constitutional rights not to be deprived of their property without due process of law for it completely ignored this important constitutional

16. The Administrative Procedure Act, 5 U.S.C.A. 556(b), Appendix D, *infra,* page 4D.

17. Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. 914(b); Appendix D, *infra,* page 1D.

issue. It could not so hold, for the very essence of due process is a fair hearing, before an impartial trier of the facts, and there is nothing fair about the hearing, or impartial about the trier of the facts, if, before the hearing ever commences, the Deputy Commissioner is directed to resolve "all doubtful questions" in favor of the employee and against the employer.

REASONS FOR GRANTING THE WRIT

1.

Even if the Court of Appeals for the Fifth Circuit's alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" actually exists, it is clearly unconstitutional because it deprives the employer and its compensation carrier of their property without the due process of law guaranteed to them by the Fifth Amendment to the Constitution of the United States.[18]

2.

No such "statutory policy" of partiality in administrative hearings actually exists, and, in fact, the plainly expressed statutory policy of both the Longshoremen's Act and the Adminstrative Proecdure Act is directly the opposite—both Acts require administrative hearing officers to be impartial.[19]

3.

The holding of the Court of Appeals below that the burden of proof is substantially less in an administrative

18. See full discussion, *infra*, pages 12 to 21.

19. See full discussion, *infra*, pages 21 to 23.

hearing than it is in a jury trial of precisely the same issue is in direct conflict with

1. This Court's express holding in *Universal Camera Corp v. National Labor Relations Board,* 340 U.S. 474, at page 477, 95 L.Ed. 456 at page 462, 71 S.Ct. 456 (1951).

2. The earlier decision of the Court of Appeals below in *Calbeck v. Strachan Shipping Co.,* 5 Cir. 1962, 306 F.2d 693, affirming *Strachan Shipping Co. v. Calbeck,* D. C. Tex. 1961, 190 F. Supp. 255, at page 260, cert. denied 372 U.S. 954, 9 L.Ed.2d 978, 83 S.Ct. 950 (1963).

3. The decision of the Court of Appeals for the Second Circuit in *John W. McGrath Corp. v. Hughes,* 2 Cir. 1959, 264 F.2d 314, at page 316.

4. The plain and unequivocal provisions of the Administrative Procedure Act which is made abundantly clear by its legislative history.[20]

4.

Whether the alleged "statutory policy" of partiality announced by the Court of Appeals below for administrative hearings actually exists, and if it does whether it meets the due process requirements of the Fifth Amendment are extremely important questions which far transcend this individual case, because they relate directly to all administrative hearings conducted by substantially all federal administrative agencies.[21]

---

20. See full discussion, *infra,* pages 23 to 29.

21. See full discussion, *infra,* pages 29 to 32.

ARGUMENT

REASON ONE

Does the due process clause of the Fifth Amendment entitle Petitioners to a fair hearing and an impartial trier of the facts in an administrative hearing which adjudicate their rights under the Longshoremen's Act and the Adminstrative Procedure Act? The Court of Appeals below held that it did not.

It so held when it concluded that the doctrine of collateral estoppel did not apply to precisely the same fact issue before the Deputy Commissioner as had previously decided by the jury in the longshoreman-employee's suit against the vessel, and the conclusion was based entirely upon its holding that the employee's burden of proof or "standard of persuasion" was substantially less before the Deputy Commissioner in an administrative hearing than it was before the jury in a judicial hearing. It reached this conclusion because it labored under the clearly erroneous impression that there was an alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" in an adminstrative proceeding. This basis of its conclusion is stated in the following language:

> ". . . The paramount difference, however, is that in considering the proof offered by the parties the Commissioner operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee or his dependent family . . . Since a jury would not be directed to find for the injured party, as a matter of policy, when the evidence created doubt about the injury, we are convinced that there is a substantial variance in the

standard of proof required to establish facts before the Commissioner and the jury. . . ."[22]

While as we shall demonstrate hereafter there is no such "statutory policy" of partiality,[23] even if this alleged "statutory policy" requiring the Deputy Commissioner to favor the employee over the employer actually existed, it is clearly an unconstitutional one because it deprives the employer and its compensation carrier of their property without the due process of law guaranteed to them by the Fifth Amendment to the Constitution. It is so clear as to really require no citation of authority, that, at the very least, the due process clause of the Fifth Amendment still requires (1) a fair hearing before (2) an impartial hearing officer whether the "doubtful fact questions" are being adjudicated by an administrative hearing officer or a judge or jury in a federal court.

That the employer and its compensation carrier, the Petitioners herein, are entitled to have their rights determined under the Longshoremen's Act fully protected by the Fifth Amendment due process guarantee was made abundantly clear by this Court when the constitutionality of the administrative process of determining facts under the Act was challenged in this Court for the first and last time in *Crowell v. Benson*.[24] The constitutional attack was made on the provisions of the Longshoremen's Act which delegated findings of fact to an administrative hearing officer and it was contended that this was an unconstitutional delegation of judicial functions and violated the due process clause of the Fifth Amendment. This Court

22. 397 F.2d 185, 188, Appendix C, *infra*, page 6C.

23. See full discussion, *infra*, pages 21 to 23.

24. 285 U.S. 22, 76 L.Ed. 598, 52 S.Ct. 285 (1932).

left no doubt that the provisions of the Longshoremen's Act providing for administrative hearings for the determination of facts were constitutional only because:

> ". . . *The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence,* falls easily within the principal of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments."[25]
>
> * * * * * *
>
> ". . . But the fact that the Deputy Commissioner is not bound by the rules of evidence which would be applicable to trial in courts or by technical rules of procedure . . . does not invalidate the proceeding, *provided substantial rights of the parties are not infringed.* . . ." (Emphasis supplied)[26]

Thus, this Court made it abundantly clear almost from the Acts' inception,—administrative hearings under the Longshoremen's Act are constitutional only with proper due process safeguards which insure that the substantial rights of the parties are not violated.

Does an alleged "policy" of partiality whether statutory, administrative or judicial, which requires the administrative hearing officer to resolve all doubtful fact questions in favor of one party over his adversary in an administrative hearing, satisfy the due process of law requirements of the Fifth Amendment? Obviously it does not, for we know of no way by which a person's constitutional

---

25. 285 U.S. 22, at page 47, 76 L.Ed. 598, at page 610, 52 S.Ct. 285 (1932).

26. 285 U.S. 22, at page 48, 76 L.Ed. 598, at 611, 52 S.Ct. 285 (1932).

rights can be more seriously infringed than by having his right to life, liberty or property determined by a hearing officer or judge or jury who is not impartial, regardless of the reason for his partianship. Resolving all doubtful fact questions in favor of the employee clearly and simply means that the employer and its compensation carrier are to be deprived of their property—not by a fair and an impartial hearing officer who will fairly and impartially, based on the evidence, resolve disputed fact issues—but by one who is partial to the employee, one who will resolve all disputed issues on the basis of some alleged "policy" of partiality which is absolutely and completely foreign to all our American concepts of fairness and justice. There is no way for the employer or its compensation carrier to have the hearing officer determine fact issues fairly and impartially once a doubtful fact question is raised, for, under the holding of the Court of Appeals below, once doubtful fact questions are raised, the hearing officer does not resolve them impartially but "all doubtful fact questions *ARE* to be resolved in favor of the injured employee."[27] If this is the due process to which the employer and its compensation carrier are entitled, our cherished desire for equal justice under law is but an idle dream—a beautiful cliche' which has neither substance nor meaning.

Indeed, this Court only last year again expressly held that while administrative agencies may adopt rules and policies to meet changing circumstances, this can be done only where they fully satisfy the requirements of the due process clause:

---

27. 397 F.2d 185, 188, Appendix C, *infra*, page 6C. Note particularly they *ARE TO BE RESOLVED*, not the Deputy Commissioner may resolve them impartially according to the evidence.

> "Administrative authorities must be permitted, *consistently with the obligations of due process,* to adapt their rules and policies to the demands of changing circumstances." (Emphasis supplied)[28]

This was a reaffirmation of what this Court held in two separate cases not long after the passage of the Administrative Procedure Act, which governs most, if not all, administrative proceedings of an adjudicatory nature, and clearly controls those under the Longshoremen's Act,[29] when it said:

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."[30]

* * * * * *

> ". . . a fair trial in a fair tribunal is a basic requirement of due process."[31]

Many other similar quotations from opinions of this Court could be added relating to the due process requirements of a fair and impartial hearing—the very essence of which is an impartial trier of the facts—but this would serve no useful purpose simply because as the Court of Appeals for the Second Circuit recently said:

---

28. *Permian Basin Area Rate*, 390 U.S. 747, 20 L.Ed.2d 312, at page 340, 88 S.Ct. 1344 (1968).

29. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 95 L. Ed. 483, 71 S.Ct. 470 (1951).

30. *Wong Yang Sung v. McGrath*, 339 U.S. 33, at page 50, 94 L.Ed. 616, at page 628, 70 S.Ct. 445 (1950).

31. *In Re Murchison*, 349 U.S. 133, at page 136, 99 L.Ed. 942, at page 946, 75 S.Ct. 623, 625 (1955).

> "It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact."[32]

The failure of the Court of Appeals below to even consider the due process aspects of its holding that the Deputy Commissioner was required to resolve all doubtful fact questions in favor of the employee and against his employer is particularly shocking in view of the many statements made by the Court of Appeals below on many occasions which reflect that, at least until this case, it has always held that the Deputy Commissioner must function as an impartial administrator of the Act. In 1960, the Court of Appeals below speaking through now Chief Judge Brown stated:

> ". . . And the Deputy Commissioner, charged generally with administration of such cases has many continuing responsibilities and duties in which *he functions as the impartial administrator.*
>
> That is of extreme importance for if the Deputy Commissioner has continuing responsibilities during the period a case is being processed on this self-executing basis, *it must be recognized that he functions as an impartial administrator bound to accord to the employer no less than to the employee all the rights and protection that the Act prescribes. In other words, his duty to determine relevant matter extends to both parties, not just one.*" (Emphasis supplied)[33]

Earlier the Court of Appeals below had stated it succinctly in these words:

---

32. *Wasson v. Trowbridge,* 2 Cir. 1967, 382 F.2d 807, at page 813.

33. *Atlantic & Gulf Stevedores, Inc. v. Donovan,* in 5 Cir. 1960, 274 F.2d 794, at pages 799-800.

> ". . . A fair trial by an unbiased and non partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge."[34]

Many similar statements can be found from the other Courts of Appeal for the various circuits but we collect only a few for illustrative purposes in the footnote below.[35]

---

34. *National Labor Relations Board v. National Paper Company,* 5 Cir. 1954, 216 F.2d 859, at page 868.

35. (a) After quoting from *In Re Murchison,* 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623, 625, that "a fair trial in a fair tribunal is a basic requirement of due process", the Court of Appeals for the Sixth Circuit held that "This rule applies to the Federal Trade Commission and other such administrative tribunals under the express terms of Section 7(a) of the Administrative Procedure Act of 1946." *American Cyanamid Company v. F.T.C.,* 6 Cir. 1966, 363 F.2d 757, at pages 763-764.

(b) ". . . at the very least, quasi-judicial proceedings entail a fair trial . . . stated otherwise with respect to agency adjudicatory proceedings, due process might be said to mean at least fair play." ". . . An administrative hearing . . . must be attended, not only with every elemeht of fairness, but with the very appearance of complete fairness. Only thus can a tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process". *Amos Treat & Co. v. Securities and Exchange Commission,* D.C. Cir. 1962, 306 F.2d 260 at pages 263, 264, 267.

(c) "The rule applies to proceedings of the Board because 'the laws under which these agencies operate prescribe the fundamentals of fair play'. Their proceedings must 'satisfy the pertinent demands of due process' . . . whether the compulsion of the rule is constitutional or statutory, the Board may not avoid it by adopting regulations inconsistent with its requirements." *Harvey Aluminum (Incorporated), v. N.L.R.B.,* 9 Cir. 1964, 335 F.2d 749, at page 753.

(d) "parties to these (administrative) proceedings are entitled to a fair, unbiased and impartial hearing. *Local No. 3, United Packinghouse Workers of America v. N.L.R.B.,* 8 Cir. 1954, 210 F.2d 325, at page 330. (Parenthetical expression added)

(e) "Due process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles, of fair play and applicable procedural standards established by law." *Swift & Company v. United States,* 7 Cir. 1962, 308 F.2d 849, at page 851.

Surely, the Court of Appeals below does not believe that what it said in the above two cases, and in many cases in a like vein,[36] no longer constitutes a part of the constitutional guarantee of due process of law in the Fifth Amendment. Or do Petitioners' difficulties stem from their inability to comprehend how an administrative hearing officer can be an impartial trier of the facts, as clearly required by the due process clause, while operating under an alleged "policy" of partiality, whether administrative, statutory or judicial, that requires him to decide "all doubtful fact questions" always in favor of the em-

---

36. (a) "Once partiality appears, and particularly when, though challenged it is unrelieved against, it taints and vitiates all of the proceedings and no judgment based upon them may stand." *National Labor Relations Board v. Phelps, et al,* 5 Cir., 1943, 136 F.2d 562, at page 564.

(b) ". . . Although its administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which inhere in due process of law." *Southern Stevedoring Co. v. Voris,* 5 Cir., 1951, 190 F.2d 275, at page 277.

(c) "We cannot escape the conclusion that the trial examiner, in uniformly crediting the General Counsel's evidence and discrediting all of respondent's, whether or not the latter was contradicted or corroborated, exhibited that degree of bias which deprives his credibility findings of the weight usually accorded them." *National Labor Relations Board v. Miami Coca Cola Bottling Company,* 5 Cir., 1955, 222 F.2d 341, at page 345.

(d) ". . . Due process in administrative proceedings of a judicial nature has been said generally to be in conformity to fair practices of Anglo-Saxon jurisprudence, . . . which is usually equated with adequate notice and a fair hearing." *Hornsby v. Allen,* 5 Cir. 1964, 326 F.2d 605 at page 608.

(e) "Due process in an administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. Administrative convenience or necessity cannot override this requirement." *Russell-Newman Mfg. Co. v. National Labor Relations Board,* 5 Cir. 1966, 370 F.2d 980 at page 984.

ployee and against the employer?[37] Petitioners respectfully submit that no one, whether judge, jury or deputy commissioner, can satisfy even the most elementary requirement of the due process clause—impartiality—while operating under any such alleged "policy".

Whether the doctrine of collateral estoppel is to be applied in this case is no longer of primary significance—perhaps not even of any significance—the real issue is simply this:

> Are the employer and its compensation carrier entitled to a fair and impartial adjudication of their rights under the Longshoremen's Act by an impartial trier of the facts?

If they are not, as the Court of Appeals below has held, this petition should be denied. Neither Petitioners

---

37. A brief illustration graphically demonstrates the complete injustice and absolute absence of due process in any such "policy" of partiality. Take the vigorously disputed fact question in this very case—whether the employee sustained an injury on the vessel. That it clearly falls within the area of the "doubtful fact questions" to which the Court of Appeals below would apply its alleged "policy" is clear—the jury decided it one way and the Deputy Commissioner exactly the opposite way. Assume, however, the Deputy Commissioner, acting impartially, and without any "policy", had concluded that the jury was right and that he too should find that the employee had not sustained an injury on the vessel. If the alleged "policy" of the Court of Appeals below is correct, he could not do so! He would be compelled to resolve this doubtful fact question in favor of the employee and would have to hold that he had sustained an injury. And this even though his own fair and impartial appraisal of the evidence convinced him that the employee had sustained no injury at all. He is compelled to reach a result he would not have reached if the "policy" had not taken away his impartiality as the trier of the facts! If this is equal justice under law—if this is due process—our cherished constitutional concepts of justice and fair play, which this Court always has guarded so faithfully, are on a short and quick trip to oblivion.

nor their counsel can bring themselves to believe that this Court will permit any such unconstitutional answer to this fundamental due process question to stand. It is respectfully submitted that this petition should be granted and that the rights of all parties to due process of law—to equal justice under law—in administrative hearings should be reaffirmed once and for all!

REASON TWO

The alleged "statutory policy" announced by the Court of Appeals below is not only unconstitutional, but it does not even exist. In fact, the "statutory policy" is exactly the opposite of that which the Court of Appeals has asserted it to be!

The Court of Appeals below cites only the Longshoremen's Act in its entirety in a footnote in support of its assertion that there is a "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee."[38] Nothing in the Longshoremen's Act supports this assertion, and there are at least two separate sections of the Longshoremen's Act which demonstrate beyond any question that no such policy of partiality is expressed in or can be implied in the Act:

---

38. The Court of Appeals below does not rely on the cases cited in its opinion (397 F.2d 185 at page 188) as confirming that any such statutory policy actually exists as its opinion on Joint Motion for Rehearing En Banc reflects. Indeed it could not, for these cases do not announce any such "policy" but base these decisions entirely on there being substantial evidence in the record before the passage of the Administrative Procedure Act and on there being the necessary reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record after its passage. In fact, the *Sheppeard* case did not even involve a "doubtful fact question" for the opinion states: "The evidence is not in dispute". *Southern Pacific Co. v. Sheppeard*, 5 Cir. 1940, 112 F.2d 147, at page 148.

1. Section 14(b) provides that the Deputy Commissioner shall "hold such hearings, and take such further action as . . . will properly protect the rights of *ALL* parties." (Emphasis supplied)[39]

2. Section 23(a) provides that the Deputy Commissioner is to conduct his hearings "in such manner as to best ascertain the rights of the parties."[40]

On what basis can it be said that a statute which affirmatively provides that the administrative hearing officer is to "properly protect the rights of all parties"[41] requires that hearing officer to be partisan and to favor one party over his adversary? There is no basis on which to support any such "policy of partiality" under such statutory language.

But the Longshoremen's Act is not the only federal statute which affirmatively provides that no such "policy of partiality" exists. The Administrative Procedure Act, under whose provisions the Deputy Commissioner is required to conduct his hearings and make his findings, also expressly provides:

1. All administrative hearing officers, which includes Deputy Commissioners, are to perform their "functions" in an "impartial manner".[42]

2. An administrative hearing officer, which includes Deputy Commissioners, cannot issue an order "except on consideration of the whole record . . .

---

39. 33 U.S.C.A. 914(h); Appendix D, *infra*, page 1D.

40. 33 U.S.C.A. 923(a); Appendix D, *infra*, page 3D.

41. "All parties"—not just the rights of the employee but those of the employer and its compensation carrier as well.

42. 5 U.S.C.A. 556(b); Appendix D, *infra*, page 4D.

> and supported by and in accordance with the reliable, probative and substantial evidence. . . ."[43]

How could Congress in both Acts more plainly and unequivocally provide that administrative hearing officers are to be non-partisan and impartial? And that their orders are to be based only on reliable, probative and substantial evidence and not on some alleged "policy of partiality?" We do not believe it could.[44]

As the alleged "statutory policy" of partiality of the Court of Appeals below does not exist, and because the actual statutory policy of the Congress, both in the Longshoremen's Act and the Administrative Procedure Act, requires the Deputy Commissioner to function in an impartial manner, Petitioners respectfully submit that this petition should be granted to correct this glaring error of the Court of Appeals below before it leads some other Court into the same error.

REASON THREE

The Court of Appeals below, in holding that the burden of proof (what they prefer to call the "standard of persuasion") is substantially less than it is in a jury trial of the same fact question, is directly contrary to this Court's

---

43. 5 U.S.C.A. 556(d); Appendix D, *infra*, pages 4D-5D.

44. Petitioners are well aware, as this Court has said on many occasions, that the Longshoremen's Act is a humanitarian one and is to be liberally construed to effectuate its humanitarian purposes. But this Court has never said—or even implied—that the constitutional rights of the employer and its compensation carrier to the due process guaranteed them by the Fifth Amendment are to be discarded or completely ignored in the name of liberality or humanitarianism. Surely, it will not do so now or at any time in the future.

holding in the *Universal Camera* case,[45] to a 1962 decision of the Court of Appeals below,[46] to a 1959 decision of the Court of Appeals for the Second Circuit,[47] and to the plain provisions of the Administrative Procedure Act.

There is no question that the employee has the burden of proving, as required by the Administrative Procedure Act, by the reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record, the facts necessary to establish his claim that he sustained an injury. Yet the Court of Appeals below concluded that the burden of proof on the employee was substantially less than the burden of proof which the employee also had upon the same issue in the jury trial of his third party claim against the vessel on which his injury allegedly occurred. That this holding is in direct conflict with this Court's decision in *Universal Camera* is graphically demonstrated by the following brief excerpts in which this Court states precisely what "substantial evidence" the employee has to present to meet his burden of proof under the Administrative Procedure Act:

1. ". . . It (substantial evidence) means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . ."

and

2. ". . . It (substantial evidence) must be enough to justify, if the trial were to a jury, a refusal

45. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951).

46. *Calbeck v. Strachan Shipping Co.*, 5 Cir. 1962, 306 F.2d 693, affirming *Strachan Shipping Co. v. Calbeck*, D.C. Tex. 1961, 190 F. Supp. 255, cert. denied 372 U.S. 954, 9 L.Ed.2d 978, 83 S.Ct. 950 (1963).

47. *John W. McGrath Corp. v. Hughes*, 2 Cir. 1959, 264 F.2d 314.

> to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . ."[48] (Parenthetical words added)

A more clear and unequivocal statement by this, or any other Court that the burden of proving by substantial evidence in an administrative hearing is the same as the burden of proof necessary to raise a fact issue for consideration by a jury can hardly be imagined. What more evidence is necessary to meet the employee's burden of proof on the same issue in a jury trial? Absolutely none—for these two statements from *Universal Camera* are classic statements of the evidence required to meet the burden of proof in a jury trial.

In completely disregarding this holding of this Court in *Universal Camera* the Court of Appeals below also ignored the fact that it had affirmed a holding by the District Court below with respect to the burden of proof before the Deputy Commissioner in which it had said:

> ". . . To carry such burden there must have been as much evidence in the record as would have justified submission of the case to a jury of laymen upon a jury trial. The Supreme Court expressly so held in Universal Camera, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, at page 462 . . ."[49]

Yet in spite of this Court's plain and unequivocal statement that the burden of proof on the employee is the

---

48. 340 U.S. 474, at page 477, 95 L.Ed. 456, at page 462, 71 S.Ct. 456 (1951).

49. *Strachan Shipping Co. v. Calbeck,* 190 F.Supp. 255, 260 (S.D. Texas, 1961), affirmed at 306 F.2d 693 (5th Cir. 1962) sub nom *Calbeck v. Strachan Shipping Co.,* cert. denied 372 U.S. 954, 83 S.Ct. 950, 9 L.Ed.2d 978 (1963).

same both before a jury and the Deputy Commissioner, the Court of Appeals below held that there was some "statutory policy" of partiality in the Longshoremen's Act which indicated the burden of proof was substantially less. Nowhere in its original opinion, in its modifying opinion on the Petitioners' First Motion for Rehearing or in its opinion on the Petitioners' Joint Motion for Rehearing En Banc, does the Court of Appeals below even consider to what, if any, extent the Administrative Procedure Act bears on the burden of proof in administrative hearings. While it says the Administrative Procedure Act did not change the standard of review of administrative proceedings, which is also directly contrary to *Universal Camera,* the Court of Appeals below never considers what, if any, change was made by the adminstrative Procedure Act in the burden of proof. Mr. Justice Frankfurter's opinion in *Universal Camera,* in an exhaustive consideration of the legislative history of the Administrative Procedure Act, makes it clear that it was the failure of many courts and administrative bodies to require as much evidence as that necessary to support a jury finding to support administrative action which caused the Congress to spell out so precisely the reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record burden of proof requirement in the Administrative Procedure Act. As this Court said through Mr. Justice Frankfurter, congressional adoption of this "test was a response to pressures for stricter and more uniform practices" with respect to the standard of proof required before administrative agencies.[50]

---

50. 340 U.S. 474, at page 489, 95 L.Ed. 456, at page 468, 71 S.Ct. 456 (1951).

If any doubt could possibly remain after *Universal Camera,* that Congress intended the burden of proof required to support an administrative order to be at least as great as that required to support a jury finding, the legislative history of the Administrative Procedure Act quickly dispells any such doubt. For the Court's convenience we have printed in Appendix E to this brief, extracts from the legislative history, but a few excerpts are illustrative:

1. — "the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity."[51]
2. "there are no real rules of probity and reliability even in courts of law, but there are certain standards and principles . . . These principals . . . are to govern in administrative proceedings."[52]
3. "Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance";[53] that is a decision is not to be reached in favor of a party once his adversary has established "doubt".

Mr. Justice Frankfurter in *Universal Camera* summed it up thusly:

> "From the legislative story we have summarized, two concrete conclusions do emerge. One is the . . . aim of the Adminstrative Procedure Act . . . regarding the proof with which the Labor Board must support a decision. The other is that now Congress has

51. Appendix E, *infra,* page 12E.

52. Appendix E, *infra,* page 1E.

53. Appendix E, *infra,* page 4E.

left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

* * * * * *

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation (Administrative Procedure Act) definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that courts consider the whole record."[54] (Parenthetical expression added)

Thus it is clear that the holding of the Court of Appeals below that the burden of proof in administrative hearings is substantially less than the burden of proof in a jury trial is directly in conflict with:

1. This Court's express holding in *Universal Camera.*
2. The earlier decision of the Court of Appeals below in *Calbeck.*
3. The decision of the Court of Appeals for the Second Circuit in *John W. McGrath Corp.*
4. The plain and unequivocal provisions of the Administrative Procedure Act, which is made abundantly clear by its legislative history.

---

54. 340 U.S. 474, at page 487, 95 L.Ed. 456, at page 467, 71 S.Ct. 456 (1951).

This petition should be granted to eliminate these conflicts.

REASON FOUR

The holding of the Court of Appeals below that an administrative hearing officer can be and is directed to resolve all "doubtful fact questions in favor of" one party to an administrative hearing and against his adversary is an extremely dangerous doctrine whose application far transcends the bounds of this individual case. The Longshoremen's Act is but one of many congressional statutes which provide for administrative hearings for the determination of "doubtful fact questions", all of which are likewise governed by the Administrative Procedure Act.

Since neither the Longshoremen's Act nor the Administrative Procedure Act afford any basis for the alleged "statutory policy" of partiality announced by the Court of Appeals below, what is likely to be the next area in administrative hearings to which, either the Court of Appeals below, or some other Court misled by it, will extend this "statutory policy" of partiality? Will it be those acts of Congress regulating labor-management relations? If so, will it be held that "all doubtful fact questions are to be resolved in favor of" management and against labor or vice versa? Or will it be the congressional statutes providing for the licensing of and regulation of the conduct of American seamen by the United States Coast Guard? If so, in an administrative hearing in which the Coast Guard seeks to revoke a seaman's license for misconduct or negligence, will it be held that all doubtful fact questions are to be resolved in favor of revocation of

the license and against the seaman or vice versa? The prospects of such holdings are frightening indeed!

Since the Administrative Procedure Act by its own terms applies to all, or at least to substantially all, administrative hearings conducted by the various agencies of the Federal government. To permit the holding of the Court of Appeals below to stand that the burden of proof or "standard of persuasion" is substantially less before an administrative hearing officer than it is before a jury in a court of law, creates a serious menace not only to the constitutional rights of the parties to such proceedings, but to the very existence of our constitutional system. If any of the constitutional rights of our citizens are to be retained in administrative hearings in which their life, liberty and property are involved, the judicial branch of our tripartite system of government must fully exercise its constitutional function as a check and balance on the legislative and executive branches. Only a fully diligent judiciary can protect the citizens of this country from a complete usurpation of all functions of government by the executive and legislative branches without due process of law, including those reserved to the judicial branch by the Constitution. The least that the Fifth Amendment to the Constitution requires, the least that the Administrative Procedure Act requires, the least that the Longshoremen's Act itself requires, when an administrative hearing officer performs the judicial functions of a fact finding nature, is that their ultimate findings are supported by at least the same type of evidence that this court requires when the same fact issues are submitted to a jury in a judicial proceeding. The size of the task may be large, but it is not nearly so great as that rightfully placed by this court on the judiciary in recent years to preserve due process of law

where the life, liberty or property of our citizens in criminal proceedings are at stake. Such due process safeguards are at least as important, if not more so, in administrative hearings, and the fact that the task may place a large burden on the judiciary should be a challenge to the courts in the performance of what has become one of their most important constitutional functions.

This constitutional function is to insure that in administrative proceedings, all parties are given an opportunity to be heard by an impartial hearing officer who then determines the facts on the basis of the reliable-probative-and-substantial-evidence-upon-consideration-of - the-whole-record, not favoring one party over the other, but only determining what that hearing officer in his own impartial consideration believes to be right. To require him to favor the employee to the detriment of the employer, is to make the hearing officer biased and prejudiced because it requires him to rule in favor of one party and against another when any "doubtful fact questions" exist. If this is what due process of law has become in administrative hearings as the Court of Appeals below has held, then there can be no doubt that maritime employers covered by the Longshoremen's Act no longer have any protection under the Fifth Amendment of the Constitution for they are being, and will be, deprived of their property without due process of law. What segment of industry, what segment of society, what group of our citizens will be next? It is frighening to even contemplate what industry, what organization, indeed, what individual, will next have to subject its life, liberty or property to an administrative hearing in which the hearing officer under an alleged "statutory policy" of partiality is held to be required to

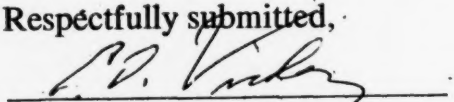
resolve "all doubtful fact questions in favor of" his adversary.

This "doubtful facts doctrine" of partiality, while thus far applied only in this case in the Court of Appeals below, is an open invitation to administrative hearing officers in all other areas to resolve "all doubtful fact questions in favor of" one party to the proceedings even though the substantial evidence in the whole record would require a contrary result. If this is all that the due process clause of the Fifth Amendment means anymore in administrative hearings, our noble profession — the law — has indeed spawned a monster which is absolutely and completely foreign to, and which will destroy, our constitutional system. This Court should put a stop to this unconstitutional "policy" of partiality now by granting the petition in this case.

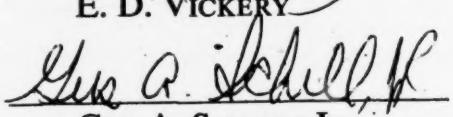
CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



E. D. VICKERY



GUS A. SCHILL, JR.

Attorneys for Petitioners

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I certify that two copies of this Petition for Writ of Certiorari were served on Mr. W. Jiles Roberts, Americana Building, Houston, Texas 77002, attorney for the Respondent, Paul Tugwell, and on the Honorable Anthony J. P. Farris, United States Attorney, Mr. James R. Gough, Mr. Jack Shepherd and Mr. Carl Walker, Assistant United States Attorneys, P. O. Box 61129, Houston, Texas 77061, on Honorable Charles Donahue, Solicitor of Labor, Department of Labor, Washington, D. C., and on Mr. Alfred H. Meyers and Mr. Arthur Bolstein, attorneys for Respondents, R. J. Shea and Gerald Leavey, Deputy Commissioners, by mailing said copies to them at their last known addresses as shown above on this the 7th day of April, 1969.

Of Royston, Rayzor & Cook

APPENDIX A

APPENDIX A

(Caption Omitted)

DEPUTY COMMISSIONER'S ORDER

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT

1. On July 12, 1958, the claimant above-named was in the employ of the employer above-named at Houston, Texas, in the Eighth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the claimant, while performing service as a longshoreman for the employer aboard the M/S "PLEASANTVILLE" upon the navigable waters of the United States, sustained injury resulting in disability. While tightening a guy line he slipped and fell on the deck of the vessel, causing injury and strain to the lower part of his back.

3. Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the claimant

with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the claimant at the time of injury was $146.36. He was paid full wages for day of injury.

4. As a result of the injury the claimant was wholly disabled from July 13, 1958, to October 18, 1958, inclusive, for which he is entitled to compensation for temporary total disability for 14 weeks at $54.00 per week, $756.00.

5. From October 19, 1958, to November 1, 1958, inclusive, 2 weeks, the claimant's weekly earning capacity was reduced from $146.36 to $80.21, a loss of $66.15. For such disability he is entitled to compensation at $44.10 per week (66⅔ percent of $66.15, his loss of earning capacity), in the sum of $88.20.

6. As a further result of the injury to his back the claimant has permanent partial disability equivalent to 20 percent loss of use of the body as a whole, including such part thereof as may have been caused by aggravation to his pre-existing congenital anomaly.

7. Maximum improvement occurred on or about May 5, 1961.

8. The claimant has had the following earnings since his injury;

From November 2, 1958, to December 31, 1958, he earned $1,664.98, averaging $185.00 per week, or an excess of $38.64 per week above his average weekly wage prior to injury.

His earnings after December 31, 1958, were as follows:

For the year 1959, $10,790.41;
For the year 1960, $13,778.26;
For the year 1961, $12,262.74;
For the year 1962, $12,452.75;
For the year 1963, $12,344.67;
For the year 1964, $14,926.99;

The average weekly wage of the claimant for the consecutive six year period above shown was $245.37, or an excess per week of $99.01 above his average weekly wage of $146.36 prior to injury.

9. From January 1, 1965, to March 8, 1965 (less the seven week strike period) the claimant's average weekly wage was $230.04, or an excess of $83.68 per week above his average weekly wage prior to injury.

10. As a consequence of his record of substantially increased earnings since November 2, 1958, and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, it is accordingly herewith determined that the claimant has sustained no loss of wage earning capacity as a consequence of his injury of July 12, 1958, within the meaning and intention of the Longshoremen's and Harbor Workers' Act.

11. At the hearing held in connection with this case before the Deputy Commissioner the employer and the insurance carrier entered a motion to dismiss the proceedings upon the grounds of "collateral estoppel" and "'res judicata". The motion was predicated upon the fact that as a consequence of claimant's injury of July 12, 1958 a Third Party Action had been instituted by the claimant in the United States District Court for the

Southern District of Texas, during the course of which the jury found that no injury had been sustained by the claimant by slipping and falling upon the deck of the M/S "PLEASANTVILLE" during the early morning hours of July 12, 1958. Judgment was entered, accordingly, in the District Court. The case was appealed to the United States Circuit Court of Appeals, Fifth Circuit, which upheld the judgment of the lower court.

12. The motion to dismiss this action before the Deputy Commissioner is herewith denied. It is considered that the doctrine of "collateral estoppel" and "res judicata" advanced by the employer and the insurance carrier as a bar to further proceedings here are inapplicable and should not prevent the claimant from pursuing his claim for compensation under the Longshoremen's and Harbor Workers' Act.

13. Accrued compensation for temporary total and temporary partial disability amounts to $844.20. The employer and the insurance carrier have paid $844.20 to the claimant as compensation.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD

The employer, the Young & Company of Houston, and the insurance carrier, the Texas Employers' Insurance Association, shall pay to the claimant compensation as follows: For temporary total disability from July 13, 1958, to October 18, 1958, inclusive, 14 weeks at $54.00 per week, $756.00; and partial disability from October 19, 1958, to November 1, 1958, inclusive, 2 weeks at $44.10 per week, $88.20; or a total of $844.20.

The employer and the insurance carrier having paid $844.20 to the claimant as compensation, the file of Paul L. Tugwell is herewith CLOSED, subject to the limitations of the Act.

Given under my hand and filed at Galveston, Texas, this 4th day of November, 1965.

GERALD B. LEAVEY
Deputy Commissioner
Eighth Compensation District

APPENDIX B

(Caption Omitted)

DISTRICT COURT'S DOCKET ENTRY

7/15/66: While CA No's 65-H-760, 841 & 844 have been consolidated under CA No. 65-H-760, motions applicable to each case shall be treated separately for convenience.

Re: CA 65-H-841: Def. Dep. Comm'r's Motion for Summary Judgment is granted, this Ct. being of the opinion that the doctrine of collateral estoppel is not applicable in this instance for lack of mutuality. See *Johnson v. Pullman Co.*, 200 F.2d 751 (5th Cir. 1952); Vol. 1B Moore, Secs. 0.441(3), 0.411(4), 0.412(2), (3).

Mutuality does not here exist as the Stevedore was not an adverse party to the longshoreman in the 3rd party action —not only not an adverse party in fact, but, under *Reed v. Yaka*, 373 U.S. 410 (1963), could not have been made so by amendment of pleadings. Exceptions to the requirement of mutuality created to, when certain conditions are met, allow a party secondarily liable to use in his own defense a judgment exonerating a party primarily liable are not here applicable as the liability of the Stevedore under the Comp. Award is not derivative. See: *Johnson v. Pullman Co.*, supra; Vol. 1B, Moore at pp. 1817 et seq. Pl's Motion for Summary Judgment is denied.

Notice. JN

(Caption Omitted)

DISTRICT COURT'S JUDGMENT

JUDGMENT DISMISSING THE PLAINTIFF'S COMPLAINT

On the 15th day of July, came on to be heard in the captioned matter the Motion for Summary Judgment filed by two of the Defendants, R. J. Shea and Gerald B. Leavey, and the Defendant's Motion for Summary Judgment, and the Court having considered the pleadings, the motions, the replies and the briefs submitted by all parties, is of the opinion that the motion filed by the Defendants, R. J. Shea and Gerald B. Leavey, should be in all things sustained and the Motion for Summary Judgment filed by the Plaintiffs should be in all things denied, now, therefore,

IT IS ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment filed by two of the Defendants, R. J. Shea and Gerald B. Leavey should be in all things sustained and the Plaintiffs' Motion for Summary Judgment should be in all things denied, and therefore, the Plaintiffs' complaint is hereby dismissed with prejudice with costs to be borne by the Plaintiffs.

ENTERED AT Houston, Texas, on this the 15th day of September, 1966-

/s/ JAMES L. NOEL
United States District Judge

APPENDIX C

APPENDIX C

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For The Fifth Circuit's First Opinion

Appeal from the United States District Court for the Southern District of Texas

---

(July 10, 1968)

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: This appeal involves the applicability of collateral estoppel to administrative proceedings and presents important first-impression questions that materially affect the administration of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.).*

In 1962 Paul Tugwell instituted a court action against A. F. Klaveness & Company, the shipowner, for injuries occurring on the ship. The shipowner impleaded Young & Company, Tugwell's employer, as a third-party defendant. After the jury concluded that Tugwell did not sustain an injury when he fell, a judgment was entered for the shipowner. Subsequently, Tugwell instituted proceedings under the Longshoremen's Act for compensation. His employer made a motion to dismiss the claim because of the previous adjudication in the third-party action that no injury was sustained on the date claimed. The Commissioner refused to apply the doctrine of collateral estoppel and held that Tugwell had sustained an injury upon

the navigable waters of the United States. The court below affirmed. Appellants contend that the Commissioner erred in not applying collateral estoppel to the worker's compensation claim under the Longshoremen's Act. Their position is that a longshoreman should not be allowed to relitigate an issue that was judicially determined against him in an earlier adversary proceeding. We reject this position and affirm the district court.

Although we resolve the issue of the applicability of collateral (sic) to administrative proceedings on narrower grounds than those discussed by the parties, the broad question raised by this appeal is when, if ever, an administrative body is bound by prior determinations of a court. Several decisions by this Court are deemed decisive by the parties. Appellees read *Teichman v. Loffland Brothers Company,* 5th Cir. 1961, 294 F.2d 175 as negating the applicability of collateral estoppel in Longshoremen's proceedings. There we held that an unsuccessful Jones Act suit was not inconsistent with a subsequent action for compensation. In the Jones Act suit the claimant admitted he was not a seaman and the jury found no injury. The Fifth Circuit decision is not controlling because the second suit under the Longshoremen's Act was for a different injury. *Id.* at 177: Appellees urge, however, that our recent decision in *Boatel, Inc. v. Delamore,* 5th Cir. 1967, 379 F.2d 850, interpreted *Teichman* more broadly. In *Boatel* an amphibious worker was injured on a drilling craft in the Gulf of Mexico. He accepted voluntary compensation payments under the Longshoremen's Act and when these payments stopped sued for continuing benefits. When this request was denied, he asserted, for the first time, that the Commissioner had no jurisdiction over the case since he was a "member of the crew." The dis-

trict court remanded to the Commissioner to determine his status and the Commissioner concluded that he was not a member of the crew. Claimant again petitioned the district court for review of the Deputy Commissioner's findings. The court set aside the order and remanded with instructions to render an order that claimant was not entitled to benefit of the Longshoremen's Act as he was clearly a member of the crew. On appeal we affirmed that holding. Another question presented was whether claimant was estopped from asserting a seaman's Jones Act claim for damages since he had accepted benefits under the Longshoremen's Act. Following *Teichman,* we held that he was not estopped. Although *Boatel* has an initial attraction, it is not dispositive. The discussion of the meaning of "a member of the crew" for the purpose of exclusion from the Longshoremen's Act indicates that we were concerned with implementing the policy that the Deputy Commissioner not act beyond the scope of the Longshoremen's Act: Thus, *Boatel* is only another example of the mutual exclusiveness of the acts. *Cf. Bodden v. Coordinated Caribbean Transport, Inc.,* 5th Cir. 1966, 368 F.2d 273, 274. Indeed, collateral estoppel as involved in the instant case would have been a premature consideration in *Boatel. Cf. Arrow Drilling Co. v. Brooks,* 5th Cir. 1962, 303 F.2d 590. It would only be in the subsequent Jones Act suit that the prior findings could be asserted as a bar. Finally, appellants offer *Shea v. Texas Employers' Insurance Association,* 5th Cir. 1967, 383 F.2d 16, to prove that collateral estoppel is applicable to proceedings before the Deputy Commissioner. There we applied collateral estoppel to give effect to a prior state court adjudication that a worker was covered by the Texas Compensation Act. That decision merely follows the mandate

that compensation is payable under the Longshoremen's Act only if recovery for disability is "not validly provided by State Law." 33 U.S.C. § 903. Once the Court knew that recovery under state law was not precluded, it was axiomatic that the injury was not also compensable under the federal law.

Having found prior decisions to be distinguishable, we move to the next level of arguments offered to support the Commissioner's action. It is asserted that the trial and administrative procedures are markedly different and that the duality of remedies envisioned by Congress when injury is occasioned by the conduct of a third party would be aborted by application of collateral estoppel in the instant case. First, it is urged that the interrogatory answered by the jury is not dispositive of the compensation claim. The jury found that Tugwell had not "sustained an injury by slipping and falling upon the deck of the M/S Pleasantville during the early morning hours of July 12, 1958." The Deputy Commissioner found that Tugwell had sustained "an injury resulting in disability while working upon a vessel upon the navigable waters of the United States." One of appellees' arguments seems to be that there can be no estoppel because the compensation remedy is a form of insurance arising out of the employee-employer relationship while the third-party action is a traditional negligence suit. Since it is well settled that collateral estoppel is applicable though the causes of action be different, this contention is too broad. It is only necessary to show that the same fact question was clearly decided in the prior suit between the same parties and that the issue was material to the determination of the prior suit. *Tomlinson. v. Leffkowitz,* 5th Cir. 1964,334 F.2d 262, 264; *United States v. Burch,* 5th Cir. 1961, 294 F.2d

1; *Hyman v. Begenstein,* 5th Cir. 1958, 258 F.2d 502, 510. A second suggested difference is that the traditional negligence issues are not present in the compensation proceedings. Although this distinction is valid, it misconstrues the jury finding in the prior negligence suit. What the jury concluded was that there was no injury, or, as we said when the case was appealed, "that the accident did not occur." *Tugwell v. A. F. Klaveness & Co.,* 5th Cir. 1963, 320 F.2d 866, 868. The question of whether there was an injury, unlike the other negligence issues, is common to both suits. Under 33 U.S.C § 903(a) the claimant has the burden of proving all that is not presumed under section 920. See *Eschbach v. Contractors, Pacific Naval Air Bases,* 7th Cir. 1950, 181 F.2d 860. Section 920 does not presume an injury so the claimant must prove its existence. *Sykes v. O'Hearne, D. Maryland,* 1960, 181 F. Supp. 368, 371.

Though the issue decided by the Commissioner was the same as the one determined by the jury, there are other differences between the two proceedings precluding collateral estoppel.[1] The proceedings before the Commissioner are more "free-wheeling," not only in the quantum of proof necessary to establish a claim, but also in the

[1]It should be noted, however, that our investigation has uncovered decisions holding that administrative bodies are bound by prior court determinations of the same fact issues. *See Lentin v. Commissioner of Internal Revenue,* 7th Cir. 1955, 226 F.2d 695; *Westgate-Sun Harbor Co. v. Watson,* D.C. Cir. 1953, 206 F.2d 458; *George H. Lee Co. v. FTC,* 8th Cir. 1940, 113 F.2d 583; *A. D. Julliard & Co. v. Johnson,* S.D. N.Y. 1957, 166 F. Supp. 577; *City of Jackson v. Holliday,* 149 So.2d 524 (Mss. 1963). Because the basis for our decision was not considered in those decsions and because the policies of the Longshoremen's Act were not applicable to those bodies, we find these cases not controlling.

nature of evidence and procedural rules that are followed. It is well settled that the Commissioner is not bound by the common-law rules of evidence or technical rules of procedure.[2] This laxity is seen in the rule that the admissibility of evidence depends only on whether it is such evidence as a reasonable mind might accept as probative. *Rocker v. Celebrezze*, 2d Cir. 1966, 358 F.2d 119. Thus, hearsay evidence is generally admissible if considered reliable. *Id.* at 119. The paramount difference, however, is that in considering the proof offered by the parties the Commissioner operates under the administrative policy that all doubtful fact questions are to be resolved in favor of the injured employee or his dependent family. *See J. V. Vozzolo, Inc. v. Britton*, D. C. Cir. 1967, 377 F.2d 144, 147; *Howell v. Einbinder*, D.C. Cir. 1965, 350 F.2d 442; *Hancock v. Einbinder*, D. C. Cir. 1962, 310 F.2d 872; *General Accident Fire & Life Ins. Corp. v. Donovan*, D.C. Cir. 1958, 251 F.2d 915; *Friend v. Britton*, D.C. Cir. 1955, 220 F.2d 820; *Hartford Accident & Indemnity Co. v. Cardillo*, D.C. Cir. 1940, 112 F.2d 11. This policy effectuates the intent of the statute to place "the burden of possible error" on those best able to bear it. *See F. H. McGraw & Co. v. Lowe*, 2d Cir. 1944, 145 F.2d 886, 888. Since a jury could not find for the injured party when the evidence created doubt about the injury, we are convinced that there is a substantial variance in the standard of proof required to establish facts before the Commissioner and the jury. The standard before the jury is the preponderance-of-credible-evidence test.

---

[2] *See Southern Stevedoring Co. v. Voris*, 5th Cir. 1951, 190 F.2d 275, 277; *California Ship Service Co. v. Pillsbury*, 9th Cir. 1949, 175 F.2d 873; *Green v. Crowell*, 5th Cir. 1934, 69 F.2d 762; *Pan-American World Airways, Inc. v. O'Hearne*, E.D.Va. 1963, 221 F. Supp. 515.

Although we cannot ascribe a legal label to the burden before the Commissioner, the administrative policy indicates that it is a less stringent standard of persuasion.

A substantial variance in the burden of proof has precluded the application of collateral estoppel in other situations. The best example is the effect of estoppel as between criminal and civil proceedings. Indeed, appellants cite one of these cases, *Amos v. C.I.R.*, 4th Cir. 1965, 350 F.2d 358, to show that an adminstrative body is bound by collateral estoppel. There in a prior criminal suit the taxpayer had been found guilty of tax evasion. The court in *Amos* held that the taxpayer was collaterally estopped to deny that he was guilty of fraud in a subsequent civil suit over a fraud penalty. *See* also *Moore v. United States*, 4th Cir. 1966, 360 F.2d 353. The decision refutes rather than supports appellants' contentions. The court emphasized that collateral estoppel was applied because the burden of proof in the criminal case was more stringent than in the subsequent civil action. The instant case involves exactly the reverse situation since the burden of proof in the administrative proceeding is less than in the prior civil action. This reverse situation invokes the other rule developed in the criminal-civil cases that the Government is not estopped to raise in a civil proceeding an issue it lost in a criminal case because the burden of proof in the criminal case is greater than in the civil action. *Helvering v. Mitchell*, 1938, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917; *Tomlinson v. Lefkowitz, supra* at 265. By the same reasoning, the fact that a worker could not convince a jury that he had suffered an injury should not estop him from attempting to convince a Commissioner that he was injured inasmuch as the standard

of persuasion is less before the Commissioner than before the court.

Therefore, since we are persuaded that the applicable legal rules enable a claimant to establish the existence of an actionable injury before the Commissioner more easily than in a civil tort action, we agree with the district court that on the facts of this case the doctrine of collateral estoppel is inapplicable.

AFFIRMED.

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For The Fifth Circuit's Second Opinion

Appeal from the United States District Court for the Southern District of Texas

(August 19, 1968)

ON PETITION FOR REHEARING

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

PER CURIAM: Appellants' motion for rehearing in the above styled case is DENIED except that page 7 of the slip opinion dated July 10, 1968, is modified to read as follows:

in considering the proof offered by the parties the Commissioner operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee or his dependent family. *See J. V. Vozzolo, Inc. v. Britton,* D.C. Cir. 1967, 377 F.2d 144, 147; *Howell v. Einbinder,* D.C. Cir. 1965, 350 F.2d 442; *Hancock v. Einbinder,* D.C. Cir. 1962, 310 F.2d 872; *General Accident Fire & Life Assurance Corp. v. Donovan,* 1955, 220 F.2d 820; *Southern Pacific Co. v. Sheppeard,* 5th Cir. 1940, 112 F.2d 147; *Hartford Accident & Indemnity Co v. Cardillo,* D.C. Cir. 1940, 112 F.2d 11. This policy effectuates the intent of the statute to place "the burden of possible error" on those best able to bear it. *See F. H. McGraw & Co. v. Lowe,* 2d Cir. 1944, 145 F.2d 886, 888. Since a jury would not be directed to find for the

injured party, as a matter of policy, when the evidence created doubt about the injury, we are convinced that there is a substantial variance in the standard of proof required to establish facts before the Commissioner and the jury. The standard before the jury is the preponderance-of-credible-evidence test. Although we cannot ascribe a legal label to the burden before the Commission, the statutory policy, as interpreted by the courts, indicates that it is a less stringent standard of persuasion.

A substantial variance in the burden of proof has precluded the application of collateral estoppel in other situations. The best example is the effect of estoppel as between criminal and civil proceedings. Indeed, appellants cite one of these cases, *Amos v. Commissioner*, 4th Cir. 1965, 360 F.2d 358, to show that an administrative body is bound by collateral estoppel. There in a prior criminal suit the taxpayer had been found guilty of tax

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For the Fifth Circuit's Third Opinion

Appeals from the United States District Court for the Southern District of Texas

(December 9, 1968)

ON JOINT PETITION FOR REHEARING EN BANC

Before JONES, WISDOM and THORNBERRY, Circuit Judges, as to Young & Company and Texas Employers Insurance Association v. R. J. Shea, Deputy Commissioner of Labor, et al.

Before COLEMAN and GODBOLD, Circuit Judges, and RUBIN, District Judge, as to Bertram W. Watson and R. J. Shea, Deputy Commissioner v. Gulf Stevedore Corporation, et al.

JOINT PER CURIAM: The Petition for Rehearing en banc filed in both of these cases is DENIED, and no member of the panel nor judge in active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

However, because of the assertion of counsel that "the opinions in these two cases are directly in conflict" and are both contrary to the decision of another panel of this circuit in *Goins v. Noble Drilling Corporation*, 5 Cir., ____ F.2d ____, (No. 24,928, July 10, 1968) we con-

sider it appropriate to add a few words to prevent others from drawing the same erroneous conclusions.

Watson and *Goins* involved the same issue: the scope of judicial review of the Deputy Commissioners findings of fact under the Longshoremen's and Harbor Workers' Compensation Act. In both cases an identical standard was applied. In *Goins* it was stated as follows: " '[T]he findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.' " *J. P. Goins v. Noble Drilling Corporation*, 5 Cir., ___ F.2d ___, (No. 24,928 at page 5, slip opinion). In *Watson*, the criterion was put in almost the same words: "The settled formula is that the decision of the administrative agency should be accepted unless there is no substantial evidence on the record as a whole to support it." *Watson v. Gulf Stevedore Corp.*, 5 Cir., No. 25,007, at page 3, slip opinion. The sole difference between these cases is that in *Goins* the record lacked substantial evidence to support the findings of the Deputy Commissioner while in *Watson* the evidence was presented and it was substantial.

The scope of judicial review of the Deputy Commissioner's findings under the Longshoremen's and Harbor Workers' Act was repeatedly held, prior to the adoption of the Administrative Procedure Act, to be the same as the latter one set forth as a general standard in the A.P.A.[1] See, for example, our 1943 opinion in *Luckenbach Gulf S.S. Co. v. Henderson*, 133 F.2d 305 and such decisions of other courts as *Voehl v. Indemnity Ins. Co.*, 1933, 288 U.S. 162, 53 S.Ct. 380; *Lowe v. Central R. Co. of New Jersey*, 1940, 3 Cir. 113 F.2d 413. And this was the stand-

[1]Administrative Procedure Act §10(e), 60 Stat. 237 (1946), 5 U.S. C.A. §1001 et seq. (1946).

ard applied by the United States Supreme Court in a case to which the prior law was applicable even though it was decided after adoption of the Administrative Procedure Act. *Cardillo v. Liberty Mut. Ins. Co.,* 1947, 330 U.S. 469, 67 S.Ct. 801.

Hence, as we have previously said, the Administrative Procedure Act did not change the scope of judicial review of the Deputy Commissioner's findings. The substantial evidence rule, properly applied, as we think it was in *Watson* as well as in *Goins,* fully effects the intention of Congress and amply safeguards the rights of litigants.

In *Young* the issue was entirely different: the question was whether the injured worker was precluded from recovery before the Commissioner by a collateral estoppel resulting from an earlier jury determination adverse to him. Concluding that the doctrine of collateral estoppel was inapplicable, the opinion in *Young* set forth expressly several reasons for this result. One of these was, "The standard of persuasion is less before the Commissioner than before the court." *Young & Co. v. Shea,* 5 Cir., No. 24,249 at page 8, slip opinion. This distinguishes the amount of evidence necessary to persuade the Commissioner under the Act from that required to persuade a jury. Nothing said there intimates any modification of the substantial evidence rule this Court has consistently applied to the question of whether the Commissoner's determination should be accepted on review.

In reviewing a decision of the Commissioner and in applying the substantial evidence rule, the reviewing court must take into account that the standard of persuasion is less before the Commissioner than it would be in a jury trial of the same issue. This is because Congress has

indicated an intention to require less.[2] The policy of the Act that all doubtful questions are to be resolved in favor of the longshoreman is to be considered in determining whether there was substantial evidence before the Commissioner.[3] Having taken this into account, the reviewing court applies the same rule to *review* of administrative proceedings that an appellate court applies to review of jury verdicts, and, in this respect, as we said in *Watson,* the *scope of review* of jury verdicts and of administrative findings is the same. It is a non sequitur to suggest that the same standards must apply to determine the burden of persuasion before the trier of fact as those applicable when an appellate court reviews the record.

---

[2]33 U.S.C. §901 et seq.

[3]See the cases cited in Young & Co. v. Shea, 5 Cir., No. 24,249 at page 7, slip opinion.

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For the Fifth Circuit's Fourth Opinion

Appeal from the United States District Court for the Southern District of Texas

ON SECOND PETITION FOR REHEARING

(December 12, 1968)

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

APPENDIX D

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

(33 U.S.C.A. Secs. 901, et seq.)

§ 914(h) HEARINGS

The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be

made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

§ 920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. Mar. 4, 1927, c.509, § 20, 44 Stat. 1436.

§ 921. Review of compensation orders

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy com-

missioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

§ 923. Procedure before the deputy commissioner

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

THE ADMINISTRATIVE PROCEDURE ACT
(5 U.S.C.A. Secs. 500, et seq.)

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any

oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

APPENDIX E

EXCERPTS FROM THE LEGISLATIVE HISTORY COVERING THE ADMINISTRATIVE PROCEDURE ACT

EXCERPTS FROM SENATE DOC. 248

Excerpts from pamphlet of the U.S. Government Printing Office Pamphlet — *Administrative Procedure Act — Legislative History,* 79th Congress, 1944-46—Senate Document No. 248.

On Section 7(c) [5 U.S.C.A. #1006 (c)] from the Report of the Senate Committee on the Judiciary at p. 208:

> The second and primary sentence of the subsection is framed on the theory that an administrative hearing is to be compared with an equity proceeding in the courts. The mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant and unduly repetitious evidence is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon evidence which is plainly of the requisite materiality and competence; that is, "relevant, reliable, and probative evidence." Thus while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of good practice simplify the hearing and record by excluding obviously improper or unnecessary evidence, the standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in non-administrative cases. There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and

kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings.

The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the subsection as well as to cases in which oral or documentary evidence is received in open hearing. Even in the latter case subject to the appropriate safeguards, technical data may as a matter of convenience be reduced to writing and introduced as in courts. The written evidence provision of the last sentence of the subsection is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is done in written form. In those situations, however, the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby." To the extent that cross-examination is necessary to bring out the truth, the party should have it. Also, an adequate opportunity must be provided for a party to prepare and submit appropriate rebuttal evidence.

From Report of Senate Committee on the Judiciary at p. 216:

The basic provision respecting evidence in section 7(c) [5 U.S.C.A. #1006(c)] that any agency action must be supported by plainly "relevant, reliable, and probative evidence"—will require full compliance by agencies and diligent enforcement by reviewing courts. Should that language prove insufficient to fix and maintain the standards of proof, supplemental legislation will become necessary.

EXCERPTS FROM SENATE DOC. 248

> The "substantial evidence" rule set forth in section 10(e) [5 U.S.C.A. #1009(e)] is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required.

From Report of the Committee on the Judiciary of House of Representatives at p. 270:

> The second and primary sentence of the section (Section 7(c) [5 U.S.C.A. #1006(c)] is framed on the premise that, as to the admissibility of evidence, an administrative hearing is to be compared with an equity proceeding in the courts. Thus, the mere admission of evidence is not to be taken as prejudicial error, there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon consideration by the agency of the whole record or so much thereof as a party may cite and

as supported by and in accordance with evidence which is plainly of the requisite relevance and materiality—that is, "reliable probative, and substantial evidence." Thus while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability, and substantiality of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand. But they exist and must be rationally applied. They are to govern in administrative proceedings. These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.

The first and second sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weight it and decide in accordance with the preponderance. In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs adduced. The proof must be substantial, as provided in this section and also in section 10(e) where the term "substantial evidence" is discussed later in this report.

The provision on its face does not confer a right of so-called "un-limited" cross examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed

to unreasonable lengths by a party or whether it is required for the "full and true disclosure of the facts" stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required "for a full and true disclosure of the facts." In many rule-making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings. The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases in which oral or documentary evidence is received in open hearing. Even in the latter case, subject to the appropriate safeguards, technical data may as a matter of convenience be reduced to writing and introduced as in courts. Among these are technical statements, reports of surveys, analyses and summaries. The written evidence provision of the last sentence of the section is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is done in written form. In those situations, however, the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby." To the extent that cross-examination is necessary to bring out the truth, the party must have it. An adequate opportunity must also be provided for a party to prepare and submit appropriate rebuttal evidence.

Agencies must comply fully and the courts, pursuant to section 10 of the bill, must enforce all of these requirements diligently.

EXCERPTS FROM SENATE DOC. 248

Referring to Section 10(e), [5 U.S.C.A. #1009(e)] from the report of the Committee on the Judiciary of House of Representatives at p. 279:

> "Substantial evidence" means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less — suspicion, surmise, implications, or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party.

From proceedings in the Senate at p. 320:

> Subsection (c) of section 7 relates to evidence. It provides that except as statutes otherwise provide, the proponent of a rule or order has the burden of proof. While any evidence may be received, as a matter of policy agencies are required to provide for the exclusion of irrelevant and unduly repetitious evidence, and no sanction may be imposed, or rule or order issued, except as supported by relevant reliable, and probative evidence. Any party may present his case or defense by oral or documentary evidence, may

submit rebuttal evidence, and may conduct reasonable cross-examination. However, in the case of rule making or determining applications for initial licenses, the agency may adopt procedures for the submission of evidence in written form so far as the interest of any party will not be prejudiced thereby.

Mr. Austin. Mr. President, at that point I wish the Senator from Nevada would yield for a question.

Mr. McCarran. I gladly yield to the Senator from Vermont.

Mr. Austin. Did the committee intentionally choose the language, "except as supported by relevant, reliable, and probative evidence" in order to avoid the rule of scintilla of proof? This phrase is very significant as I see it. On the review, for example, the case, in order to carry through as decided by the agency, would have to be supported by relevant, reliable, and probative evidence. That is, in my opinion, a very important forward step in judicial procedure, to say nothing about administrative procedure. For my part I am glad to see it in the bill.

Mr. McCarran. Let me say to the Senator from Vermont that in the preparation of this bill many obstacles were encountered. Some of us insisted that the testimony must be relevant, material, and competent, and that nothing else should be taken. However, representatives of agencies came before us and presented their views, saying that such a rule would curtail their operations, and that they ought to be given greater latitude. They said to us, "We are not lawyers. We are acting in a quasi-judicial capacity. We ought to be able to go outside and get hearsay

testimony, if you please. We might be able to indulge in theory." So rather than curtail the agencies, we sought an intermediate ground which we thought would be protective of the rights of individuals, and at the same time would not handicap the agencies. So we said to them, "You may go outside and get what would be secondary evidence, or hearsay; you may perhaps even go into the realm of conjecture; but when you write your decision it must be based upon probative evidence and nothing else. If in the formation of your decision you consider other than probative evidence, your decision will be subject to being set aside by a court of review."

In other words, we did not wish to destroy the administrative agencies or prescribe the methods under which they have been operating. Some of us know that in committees of the Senate we very fequently hear evidence which we know is hearsay. I doubt very much if any hearing is ever conducted in which, to some extent, hearsay is not admitted. But we believe and we now believe, that reasonable men can sift the grain from the chaff. Then we laid down the rule that the administrative agencies must not make a finding which impinges upon an individual unless there is behind such finding probative evidence to sustain it. That is what we have worked out in this bill. I have given the explanation at some length in answer to the Senator from Vermont.

Mr. Ferguson. Mr. President, will the Senator yield—

Mr. McCarran. I yield.

Mr. Ferguson. Would the Senator, then, say that the judgment or decision of the agency must be based upon stronger proof than a scintilla of evidence?

Mr. McCarran. Very much stronger.

Mr. Ferguson. The old rule which applied in the courts, particularly on certiorari, was that if there was any evidence to sustain the verdict or judgment, it should be sustained. The courts have many times so held. The Senator would say, would he not, that something more than "any evidence" is required to sustain such a decision?

Mr. McCarran. The answer is in the affirmative. We say that the evidence must be substantial probative evidence.

Mr. Ferguson. So we are changing the rule which has been applied in the past that any evidence, or a scintilla of evidence, as it is sometimes defined, is sufficient to sustain a verdict or judgment.

Mr. McCarran. We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and so that they could say, "We are not afraid to have our findings reviewed by a court."

Mr. George. Mr. President, will the Senator yield?

Mr. McCarran. I yield.

Mr. George. The courts have many times held that if there is any evidence to sustain the findings of an adminstrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?

Mr. McCarran. The courts have given various constructions. The courts, in reviewing an order, are governed by the provisions of section 10(e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substantive nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.

Mr. George. The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it.

Mr. McCarran. I would put it in this way—

Mr. George. Would the enactment of this bill require some substantial or probative evidence to support such a finding?

Mr. McCarran. Yes.

Mr. George. Take the labor-relations cases. Senators are familiar with them. The circuit courts have frequently complained against what the Labor Relations Board did, but have said, "We are powerless to interfere with it." Would this bill change that rule, if the court were of the opinion that there was no probative evidence?

Mr. McCarran. Yes; it would change that rule.

Mr. George. I am pleased to hear it.

Mr. McCarran. I thank the Senator.

EXCERPTS FROM SENATE DOC. 248

From the proceedings in the House of Representatives at p. 364:

EVIDENCE, SECTION 7(C)

Subsection (c) of section 7 is one of the more important provisions of the bill. In its final report the Attorney General's Committee on Administrative Procedure stated that—pages 70-71:

> Although administrative agencies may be freed from observance of strict common-law rules of evidence for jury trials, it is erroneous to suppose that agencies do not, as a result, observe some rules of evidence. * * * Abuses in admitting remote hearsay and irrelevant or unreliable evidence there surely have been. * * * That strict adherence to standards of relevance and probative value should be observed needs no underscoring. A diffuse record dissipates the energies of the parties and the deciding authorities and distracts attention from the issues. Careless admission of evidence for what it is worth—a practice not infrequent among trial examiners—swells the record beyond its necessary limits.

Section 7 (c) of this bill provides that the proponent of a rule or order has the burden of proof except as statutes otherwise provide. It authorizes

agencies to receive any evidence, although as a matter of policy they are required to provide for the exclusion of irrelevant, immaterial, or unduly repetitious matter. Thus, the mere fact that such matter is in the record would not of itself be reversible error. The principal provision of the subsection provides that no sanction may be imposed or rule or order be issued except upon consideration of the whole record or such portions as any party may cite and as supported by and in accordance with reliable, probative, and substantial evidence. The parties are authorized to present documentary, oral, and rebuttal evidence and to conduct reasonable cross-examination. In rule making or determining applications for initial licenses agencies may adopt procedures for the submission of the evidence in written form, so far as the interest of any party will not be prejudicial thereby.

The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations—first, that the agency must examine and consider the whole of the evidence relevant to any issue and, secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—see Edison Co. v. Labor Board (305 U.S. 197, 230). Under this provision agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative

action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the whole of it.

From the proceedings in the House of Representatives at p. 370:

SCOPE OF REVIEW, SECTION 10 (E)

The final subsection or section 10 states the extent or degree of review which courts are required to afford under this bill. I have already referred to the exemption of situations in which Congress has specifically withheld review or in which action has by law been committed to the absolute discretion of administrative agencies.

Subsection (e) of section 10 requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions and the determination of the meaning or applicability of any agency action. They must compel action unlawfully withheld or unreasonably delayed. They must hold unlawful any action, findings, or conclusions which they find to be, first, arbitrary or an abuse of discretion; second, contrary to any provision of the Constitution; third, in violation of statutes or statutory rights; fourth, without observance of procedure required by law; fifth, unsupported by substantial evidence in any case reviewed upon the record of an agency hearing provided by statute; or, sixth, unwarranted by the facts so far as the latter are subject to trial de novo. In making these determinations the court is to consider the whole record or such parts as any party may cite and, where error has been fully cured prior to the effective date of agency action, the courts may apply the rule respecting nonprejudicial error.

EXCERPTS FROM SENATE DOC. 248

The term "substantial evidence" as used in this bill means evidence on the whole record as reviewed by the court and in the exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirements of section 7(c) heretofore discussed. Under this section the function of the courts is not merely to search the record to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency action by a scintilla or by mere hearsay, rumor, suspicion, speculation, and inference —cf. *Edison Co. v. Labor Board* (305 U.S. 197, 229-30). Under this bill it will not be sufficient for the Court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some "tenuous support of evidence"—*Bridges v. Wixon* (326 U.S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence.

Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must of course be tried and determined de novo by the reviewing court.

Whether a court is proceeding upon an administrative or a judicial record, the requirement of review upon the whole record means that courts may not look only to the case presented by one of the parties but must decide upon all of the proofs submitted.

Referring to Section 10(e) (5) [5 U.S.C.A. #1009(e) (5)] from the proceedings in the House of Representatives at p. 378.

Excerpts From Senate Doc. 248

Fifth. "A decision which is unsupported by substantial evidence" can be set aside. I mentioned just a little while ago that many cases in which decisions have been rendered upon a mere scintilla of evidence, and not on the weight of the evidence, have been discovered. In many instances the decisions have been based upon evidence which is not competent. But under the provisions of this bill it is required that all such decisions shall be based upon and predicated upon substantial evidence. That is the only fair basis upon which decisions of this character should be made by either a court or any agency assuming the authority to hear and determine cases.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Associated-Banning Co. v. *Landy*, 254 F. Supp. 275	8
Baltimore and Philadelphia Steam Boat Co. v. *Norton*, 284 U.S. 408	5
Banks v. *Chicago Grain Trimmers*, 390 U.S. 459	7, 9
Bernatowicz v. *Nacirema Operating Co.*, 142 F. 2d 385	6
Calbeck v. *Strachan Shipping Co.*, 306 F. 2d 693, certiorari denied *sub nom. Gee* v. *Strachan Shipping Co.*, 372 U.S. 954	6
Cream Top Creamery v. *Dean Milk Co.*, 383 F. 2d 358	9
Crowell v. *Benson*, 285 U.S. 22	5, 8
Denver Building and Constr. Tr. Co. v. *National Labor Relations Board*, 186 F. 2d 326, reversed, 341 U.S. 675	9
Friend v. *Britton*, 220 F. 2d 820	6
Helvering v. *Mitchell*, 303 U.S. 391	5
Howell v. *Einbinder*, 350 F. 2d 442	6
Kalb v. *Feurstein*, 1940, 308 U.S. 433	9
Lawlor v. *National Screen Service Corp.*, 349 U.S. 322	4
Leonard v. *Liberty Mutual Ins. Co.*, 267 F. 2d 421	8
Lyons v. *Westinghouse Electric Corp.*, 222 F. 2d 184, certiorari denied *sub nom. Walsh* v. *Lyons*, 350 U.S. 825	9

349-601—69

Cases—Continued	Page
F. H. McGraw & Co. v. *Lowe*, 145 F. 2d 886	5, 6
John W. McGrath Corp. v. *Hughes*, 264 F. 2d 314	6
O'Keeffe v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359	7
Paschal v. *Lykes Bros. S. S. Co.*, 264 F. Supp. 836	8
Thibodeaux v. *J. Ray McDermott & Co.*, 276 F. 2d 42	8
Tugwell v. *A. F. Klaveness & Co.*, 320 F. 2d 866, certiorari denied, 376 U.S. 951	3
United States v. *Real Estate Boards*, 339 U.S. 485	5
Voris v. *Eikel*, 346 U.S. 328	5
J. V. Vozzolo, Inc., v. *Britton*, 377 F. 2d 144	5, 6
Statutes:	
Administrative Procedure Act, Section 7, as amended, 5 U.S.C. (Supp. II) 556(d)	7
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*:	
Section 19, 33 U.S.C. 919	8
Section 19(a), 33 U.S.C. 919(a)	5, 9, 11
Section 19(c), 33 U.S.C. 919(c)	5
Section 20, 33 U.S.C. 920	5, 11
Section 21(b), 33 U.S.C. 921(b)	4, 11
Section 22, 33 U.S.C. 922	9, 12
Section 23, 33 U.S.C. 923	8
Section 23(a), 33 U.S.C. 923(a)	5, 12
Section 33, 33 U.S.C. 933	13
Miscellaneous:	
2 Davis, *Administrative Law*, § 18.11, p. 619	9

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1239

YOUNG AND CO., ET AL., PETITIONERS

v.

R. J. SHEA, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1C–10C) is reported at 397 F.2d 185, and its opinion on joint petition for rehearing en banc (Pet. App. 11C–14C) is reported at 404 F.2d 1059. The docket entry of the district court (Pet. App. 1B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1968. Motions for rehearing were denied on August 19, 1968, December 9, 1968, and December 12, 1968. By order dated March 6, 1969, Mr. Jus-

tice Black extended the time for filing a petition for a writ of certiorari until April 11, 1969, and the petition was filed on April 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly sustained the Deputy Commissioner's ruling that an adverse jury verdict in a longshoreman's negligence and unseaworthiness suit does not bar recovery under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*).[1]

STATUTE INVOLVED

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

1. Paul Tugwell, a longshoreman employed by Young and Co.,[2] brought suit in the United States District Court for the Southern District of Texas against the owner of the *M/S Pleasantville*, alleging that he was injured while working aboard the ship on July 12, 1958, that the owner was negligent, and that the vessel was unseaworthy. The owner then impleaded Young and Co. When the case was submitted to the jury, a verdict was returned against Tugwell,

[1] The same question is presented in No. 1254, O.T., 1968, *Strachan Shipping Co., et al.* v. *Shea, Deputy Commissioner, et al.*

[2] Petitioners here are (1) the employer, Young and Co. and (2) its workmen's compensation insurance carrier.

with the jury answering the following special interrogatory in the negative:

> Did the plaintiff, Paul L. Tugwell, sustain an injury by slipping and falling upon the deck of the M/S PLEASANTVILLE during the early morning hours of July 12, 1958?

The court of appeals affirmed the judgment against Tugwell, *Tugwell* v. *A. F. Klaveness & Co.*, 320 F. 2d 866 (C.A. 5), and certiorari was denied, 376 U.S. 951.

2. Tugwell separately sought compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act for the injury which had formed the basis for his lawsuit. After an administrative hearing, the respondent Deputy Commissioner concluded that he was not bound by the jury verdict and found on the basis of the administrative record that on July 12, 1958, Tugwell,

> * * * while performing service as a longshoreman for the employer [petitioner Young and Co.] aboard the "M/S PLEASANTVILLE" upon the navigable waters of the United States, sustained injury resulting in disability. While tightening a guy line he slipped and fell on the deck of the vessel, causing injury and strain to the lower part of his back. (Pet. App. 1A).

Tugwell was accordingly found to have been entitled to the compensation benefits he had been paid following the accident, but since there had been no showing of a loss of prospective earning power, the Deputy Commissioner found no additional benefits payable. Tugwell's file thus was ordered "closed", subject to the limitations of the Act. (Pet. App. 3A–5A).

Pursuant to Section 21(b) of the Act, 33 U.S.C. 921(b), petitioners then brought this action in the United States District Court for the Southern District of Texas, challenging the compensation order as not "in accordance with law." The district court rejected their reliance on the earlier jury verdict and sustained the award. The court of appeals affirmed, 397 F. 2d 185, and various petitions for rehearing and rehearing *en banc* were denied.

ARGUMENT

Despite petitioners' contentions, there can be no real doubt, as the court below held, that the necessary elements for invoking the doctrine of collateral estoppel are not present in this case. Furthermore, application of collateral estoppel here would be contrary to the explicit congressional policy of assigning to the Deputy Commissioner full responsibility for resolving factual disputes concerning compensation claims under the Act.

1. A party may be collaterally estopped only with respect to "issues actually litigated and determined in the prior suit." *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326. A settled corollary of this rule is that the doctrine will not apply if in the former proceeding a higher standard of proof was applicable or if the party against whom the defense is raised did not have the benefit of favorable presumptions available to him in the second type of proceeding. Thus, for example, acquittal on a criminal charge does not bar a subsequent civil action based on the same alle-

gations. See, *e.g.*, *United States* v. *Real Estate Boards,* 339 U.S. 485; *Helvering* v. *Mitchell,* 303 U.S. 391.

The Longshoremen's and Harbor Workers' Act, in furtherance of the Congressional purpose to "furnish a prompt, continuous, expert and inexpensive method" of providing administrative compensation benefits for injured longshoremen, *Crowell* v. *Benson,* 285 U.S. 22, 46, expressly confers on the Deputy Commissioner "full power and authority to hear and determine all questions" concerning compensation claims. 33 U.S.C. 919(a). He is an expert and can make his own investigations (33 U.S.C. 919(c)) and is not "bound by common law or statutory rules of evidence or by technical or formal rules of procedure" (33 U.S.C. 923(a)). He is directed to "make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties." *Ibid.*

The purpose of the Act is to assure that every longshoreman injured on the job, regardless of fault, shall receive adequate compensation for his injuries. *Voris* v. *Eikel,* 346 U.S. 328. Congress intended that the burden of possible errors in granting compensation to longshoremen should be borne by the industry. *Baltimore and Philadelphia Steam Boat Co.* v. *Norton,* 284 U.S. 408, 414; *J. V. Vozzolo, Inc.* v. *Britton,* 377 F. 2d 144, 147 (C.A.D.C.); *F. H. McGraw & Co.* v. *Lowe,* 145 F. 2d 886, 888 (C.A. 2). As a manifestation of this policy, Congress has expressly created a series of presumptions running in the claimant's favor, which may be overcome only if there is "substantial evidence to the contrary." 33 U.S.C. 920. Therefore,

as the court below correctly pointed out, the federal courts have consistently held that the Deputy Commissioner "operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee or his dependent family." 397 F. 2d 188. *J. V. Vozzolo, Inc.* v. *Britton, supra,* 377 F. 2d at 147; *Howell* v. *Einbinder,* 350 F. 2d 442 (C.A.D.C.); *Friend* v. *Britton,* 220 F. 2d 820 (C.A. D.C.); *F. H. McGraw & Co.* v. *Lowe,* 145 F. 2d 886 (C.A. 2); *Bernatowicz* v. *Nacirema Operating Co.,* 142 F. 2d 385 (C.A. 3).

In view of these considerations, the court of appeals correctly noted that a compensation claimant may be found entitled to compensation benefits even if he was unable to meet the burden of persuasion in a civil suit arising out of the same incident. 397 F. 2d at 188, 404 F. 2d at 1062.

Contrary to petitioners' assertions (Pet. 11, 24, 28), the decision below does not conflict with the Second Circuit's opinion in *John W. McGrath Corp.* v. *Hughes,* 264 F. 2d 314.[3] It is difficult to understand how that case could be in conflict with this one. The court there *affirmed* an award of compensation, finding that it was

[3] Petitioners also contend that the decision in this case conflicts with another decision by the court below, *Calbeck* v. *Strachan Shipping Co.*, 306 F. 2d 693 (C.A. 5), certiorari denied, *sub nom. Gee* v. *Strachan Shipping Co.*, 372 U.S. 954. An alleged inconsistency within a circuit need not occasion the exercise of this Court's certiorari jurisdiction, but we note in any event that *Strachan Shipping* involved facts and issues quite distinguishable from the case at bar. Significantly, no judge of the Fifth Circuit even requested a poll of his colleagues on whether the court *en banc* should have reheard the present case (see Pet. App. 11C).

supported by substantial evidence. Insofar as petitioners rely on this decision for its formulation of the test of judicial review under the Administrative Procedure Act (Pet. 24), their reliance is misplaced. The court below did not dispute, and we do not deny, that awards under the Longshoremen's Act must be supported by substantial evidence on the record as a whole. *Banks* v. *Chicago Grain Trimmers,* 390 U.S. 459, 467. It does not follow, however, that the burden of persuasion before the Deputy Commissioner is as great as it is before a jury. To the contrary, as noted above, where the evidence is in balance a jury is required to find for the defendant, but by virtue of the various statutory presumptions in favor of a claim under the Longshoremen's Act, and in light of the evident "humanitarian nature" of the Act, *O'Keeffe* v. *Smith, Hinchman & Grylls Associates,* 380 U.S. 359, 362, the Deputy Commissioner must resolve marginal fact questions in favor of the compensation claimant. The courts below thus correctly held that a prior jury verdict is not conclusive on the Deputy Commissioner in compensation hearings under the Longshoremen's and Harbor Workers' Compensation Act.

Nothing in the Administrative Procedure Act calls for a different result. That Act certainly cannot be interpreted as having repealed, by implication, the statutory presumptions long established in favor of claimants by the Longshoremen's Act. Indeed, Section 7 of the Administrative Procedure Act, as amended (5 U.S.C. (Supp. II) 556(d)), specifically provides

that general rules as to burden of proof apply "[e]xcept as otherwise provided by statute." The general provisions of the APA, therefore, did not supersede the well-established and carefully developed standards applicable under the Longshoremen's Act.

2. There is a further substantial reason why the Deputy Commissioner properly refused to allow a verdict in a civil proceeding to pre-empt his decision. The Longshoremen's Act was designed "to furnish a prompt continuous, expert and inexpensive method of dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell* v. *Benson, supra,* 285 U.S. at 46. The Deputy Commissioner has been granted exclusive jurisdiction to "hear and determine all questions in respect of" compensation claims, 33 U.S.C. 919, and in doing so he is not "bound by common law or statutory rules of evidence or by technical or formal rules of procedure", 33 U.S.C. 923. The Deputy Commissioner may not be foreclosed from making that determination by prior judicial proceedings. See *Leonard* v. *Liberty Mutual Ins. Co.,* 267 F. 2d 421 (C.A. 3); *Thibodeaux* v. *J. Ray McDermott & Co.,* 276 F. 2d 42, 48–51 (C.A. 5); *Paschal* v. *Lykes Bros. S.S. Co.,* 264 F. Supp. 836 (S.D. Tex.); *Associated-Banning Co.* v. *Landy,* 254 F. Supp. 275 (N.D. Calif.). Application of the doctrines of *res judicata* and collateral estoppel would unjustifiably deprive the Deputy Commissioner of his exclusive statutory responsibility to "hear and determine all questions" with respect to compensation

claims. 33 U.S.C. 919(a). See 2 Davis, *Administrative Law,* § 18.11, p. 619. As the Court of Appeals for the District of Columbia Circuit explained in a similar context:

> Where the application of the judicial doctrine *res judicata* would be inconsistent with the method devised by Congress the doctrine will not be enforced by the courts. *Kalb* v. *Feurstein,* 1940, 308 U.S. 433, 444 * * *. It is for this reason we hold against the contention of [the union] and not because of lack of any of the elements which usually make out a case for the application of *res judicata.* The doctrine is not to be used where the circumstances create a semblance of conditions for its application but to apply it would submerge the plan of Congress for the administration and enforcement of its policy.

Denver Building and Constr. Tr. Co. v. *National Labor Relations Board,* 186 F. 2d 326, 332.[4] See, also, *Cream Top Creamery* v. *Dean Milk Co.,* 383 F. 2d 358 (C.A. 6); *Lyons* v. *Westinghouse Electric Corp.,* 222 F. 2d 184 (C.A. 2), certiorari denied *sub nom. Walsh* v. *Lyons,* 350 U.S. 825. In addition, since the Deputy Commissioner is not bound by his own prior findings, see 33 U.S.C. 922; *Banks* v. *Chicago Grain Trimmers,* 390 U.S. 459, it would be anomalous indeed to conclude that findings in a separate type of action foreclosed independent inquiry.

---

[4] Although this Court reversed on the merits, 341 U.S. 675, it specifically approved the court of appeals' view that *res judicata* was inapplicable. 341 U.S. at pp. 681–683.

The courts below correctly held that the Deputy Commissioner was not bound by the jury verdict. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

MORTON HOLLANDER,
RALPH A. FINE,
Attorneys.

MAY 1969.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act provides in pertinent part:

(Section 19, 33 U.S.C. 919)

PROCEDURE IN RESPECT OF CLAIMS.

(a) * * * a claim for compensation may be filed with the deputy commissioner * * * and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

(Section 20, 33 U.S.C. 920)

PRESUMPTIONS.

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

(Section 21, 33 U.S.C. 921)

REVIEW OF COMPENSATION ORDERS.

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in

whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order * * *.

* * * * *

(Section 22, 33 U.S.C. 922)

MODIFICATION OF AWARDS.

Upon his own initative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. * * *

(Section 23, 33 U.S.C. 923)

PROCEDURE BEFORE THE DEPUTY COMMISSIONER.

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. * * *

* * * * *

(Section 33, 33 U.S.C. 933)

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1969

BRIEF IN OPPOSI-
TION TO PETITION
FOR A WRIT OF
CERTIORARI

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 21 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1968

NO. 1239

YOUNG & CO., ET AL.
Petitioners

v.

R. J. SHEA, DEPUTY COMMISSIONER,
UNITED STATES DEPARTMENT OF LABOR,
ET AL.
Respondents

BRIEF FOR THE RESPONDENT PAUL L. TUGWELL IN OPPOSITION

W. JILES ROBERTS
Attorney for Respondent Tugwell
617 Americana Building
Houston, Texas 77002

INDEX

Page

Argument

Question No. 1 1-8

Question No. 2 8,9

Certificate of Service 11

Questions Presented 2

Statement 3

Statutes and Rules Involved

Rule 43, FRCP 2,3,4,5,6a,7a

Rule 49, FRCP 2,4,8a,9a

Rule 59, FRCP 2,4,1a,2a

Rule 60, FRCP 2,4,5,3a,4a

33 U.S.C. 914 ..... 2,5,6,10a,11a

33 U.S.C. 919 ..... 2,3,4,5,12a

33 U.S.C. 922 ..... 2,5,13a,14a

33 U.S.C. 929 ..... 2,6,15a

33 U.S.C. 930 ..... 2,6,16a,17a

5 U.S.C. 556
(formerly 1006)..... 2,8,18a

TABLE OF AUTHORITIES

Pa

Banks v. Chicago Grain Trimmers
390 U.S. 459, 464-465 5

Betts v. Brady
316 U.S. 455,462;
62 S. Ct. 1252, 1256 9

Communist Party v. Subversive
Activities Control Board
351 U.S. 115;
76 S. Ct. 663,667 8

Gibbs v. Burke
337 U.S. 775,776;
69 S. Ct. 1247,1249 8

Gideon v. Wainwright
372 U.S. 335;
83 S. Ct. 792 9

Rogers v. DeVries & Co.
236 F.S. 110 7

Stanfield v. Lykes Bros.
S.S. Co., 5th Circuit
124 F_2 999,1004 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1968

NO. 1239

YOUNG & CO., ET AL.
Petitioners

v.

R. J. SHEA, DEPUTY COMMISSIONER,
UNITED STATES DEPARTMENT OF LABOR,
ET AL.
Respondents

BRIEF FOR THE RESPONDENT PAUL L. TUGWELL IN OPPOSITION

QUESTIONS PRESENTED

1. Did the courts below correctly refuse to apply the doctrine of collateral estoppel to the longshoreman's claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act where the longshoreman had previously in a claim based upon the same alleged injuries failed to secure a favorable jury finding in a third party action against the vessel owner tried under the Federal Rules of Civil Procedure? (The same question (under a somewhat different background) is presented in No. 1254 October Term, 1968, styled Strachan Shipping Co. et al vs. Shea, Deputy Commissioner et al; however, in that case the injured longshoreman has filed a petition for writ of certiorari in Cause No. 1311, October Term, 1968, styled Lester Nehring vs. Empresa Lineas Maritimas Argentinas vs. Strachan Shipping Co., raising certain questions concerning the trial of the third party case, which petition, if granted and reversal had would presumably render moot the question raised in No. 1254.)

2. Does the petitioners asserted constitutional question of due process exist in this case?

STATUTES AND RULES INVOLVED

The statutes and rules involved are as follows: Rule 43, 49, 59, and 60, Federal Rules of Civil Procedure, 33 U.S.C. 914(a)(b)(c)(d), 919(a)(c), 922, 929, 930 and 5 U.S.C. 556 formerly 1006 set out in appendix.

STATEMENT

Respondent Tugwell in general adopts the statement of the case as made by the deputy commissioner but to this would add, that the third party action by Tugwell referred to by the deputy commissioner was tried under the Federal Rules of Civil Procedure in which trial the admissible evidence was determined by Rule 43, Federal Rules of Civil Procedure, pages 5a-7a, appendix; whereas this cause for compensation was tried in an administrative hearing before the deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act; in the trial of the claim under the Longshoremen's and Harbor Workers' Compensation Act, the deputy commissioner was given full power and authority to hear and determine all questions in respect to the claim (see 33 U.S.C. 919(a), page 12a, appendix) and the deputy commissioner was directed to make such investigation as he considered necessary in respect to the claim for compensation (see 33 U.S.C. 919(c), page 12a, appendix). The jury was not authorized or directed to make an investigation into the facts.

ARGUMENT

Question No. 1

Respondent Tugwell contends that the case was correctly decided below; he expressly adopts the argument of the deputy commissioner and attempts to avoid repetition of what is said there, by so doing.

The procedural rules under which the two different proceedings were tried are different and the fact finders are changed under the law with different duties, as to essentially the same facts; the different duties, when exercised under the applicable law results in many cases in different results. The jury has no power to make an investigation into the merits of the case tried before it, but only to decide the issues submitted under Rule 49, Federal Rules of Civil Procedure, 8a appendix; whereas the deputy commissioner is authorized and directed under 33 U.S.C. 919(c), supra, to make or cause to be made such investigations into the claim as he considers necessary. It, no doubt, would be reversible error for the jury in a civil case to attempt to make or cause to be made such an investigation as they might consider necessary as congress has directed the deputy commissioner to do. The jury is dependent for their knowledge upon such facts as the parties may offer evidence before them under Rule 43, Federal Rules of Civil Procedure and they are sworn by their oaths as jurors to decide the case under such evidence as admitted for their consideration by the court; whereas the deputy commissioner is directed by congress to find the facts from his own investigation, if necessary. The matter of a new trial or rehearing in the jury case are matters to be determined by Federal Rules of Civil Procedure, Rule 59 and 60, pages 1a - 4a, appendix. Whereas, in the longshoreman's case for compensation under the Longshoremen's and Harbor Workers' Compensation Act

the deputy commissioner may on his own motion (see 33 U.S.C. 922, page 13a, appendix) upon a change of condition or mistake in fact (mistake in fact includes the matter of occurrence of injury, see Banks vs. Chicago Grain Trimmers, 390 US 459, pages 464-465), even though the mistake was induced by the longshoreman himself by failing to offer evidence known by him to exist at the time of an earlier hearing, see Stanfield v. Lykes Bros. S.S. Co., 5th Circuit, 124 F_2 999,1004; under Federal Rules of Civil Procedure 60(b) his burden to obtain relief from the judgment would be much greater. So no matter what words are used to describe the differences between the two hearings the burden on the longshoreman is much less before the deputy commissioner than before the jury and if a mistake is made or change of condition occurs, either side may obtain prompt relief.

The exclusive jurisdiction to determine all matters relating to compensation which would include the matter of injury has been placed by congress in the hands of the deputy commissioner under 33 U.S.C. 919(a), supra. If petitioners view were to prevail this would likely work havoc in the operation of the Longshoremen's and Harbor Workers' Compensation Act insofar as a self executing part of the same is considered, (see 33 U.S.C. 914, page 10a, appendix). Under the statutory scheme, unless the employer controverts the right to compensation under 33 U.S.C. 914(d), he is required to commence payment of compensation on the 14th day

after the employer has knowledge of the injury which he did in this case, without a formal order or hearing. If the longshoreman is faced with the prospect of collateral estoppel by reason of an adverse jury verdict, even though the employer would not ordinarily, infra, contest the question of injury before the deputy commissioner, prudent handling of his litigation would require him to secure a hearing before the deputy commissioner and entry of a formal order from the deputy commissioner in almost every case to the effect that the longshoreman had sustained the injury on the occassion claimed even though the employer was proceeding with the payment of compensation under 33 U.S.C. 914(c) thereby creating an excessive workload on the deputy commissioner's office and would materially and adversely affect the self executing phase of the Longshoremen's and Harbor Workers' Compensation Act. Most likely this would result in the need of additional deputy commissioners and/or delay. As a practical matter under the present arrangement, the employer seldom controverts the occurrence of the injury before the deputy commissioner and usually commences the payment of compensation without his intervention and if problems arise, they are usually handled by informal conference. The employer is under civil penalty to keep a record of all injuries to his employees, 33 U.S.C. 929, page 15a, appendix, and make a report of all injuries to his employees to the deputy commissioner, see 33 U.S.C. 930, page 16a, appendix; whereas the

employer seldom controverts the matter of injury before the deputy commissioner, both the employer and vessel owner customarily and except in the most serious and obvious cases deny the occurrence of the injury in the third party case against the vessel owner and collaborate to defeat the injured longshoreman's suit, even to the extent of not following the spirit of the trial courts instructions, for an example see Rogers v. DeVries & Co. 236 FS 110.

The result reached by the deputy commissioner is buttressed as being correct for the reason that the deputy commissioner had before him the fact that the injury was immediately reported to its authorized employees who could view first hand the cause and effects of the alleged fall, the admissions of the employer and insurance carrier in voluntarily furnishing medical attention, paying compensation for several months and was properly evidence to be considered by the deputy commissioner as admissions against interest as against the employer and insurance carrier whereas such matters would not have been properly admissible as against the vessel owner in the third party action, against whom the finding of injury had to be secured in the third party action and further whereas the injury was promptly reported to the employer in accordance with accepted practices; accepted practices as to Tugwell did not require the prompt reporting of the injury to the third party and it was not reported by him to

the third party, so as a practical matter different cases were tried before the different tribunals.

Question No. 2

Notwithstanding the claimed due process clause violation, it simply does not realistically exist. It can only be contended for under an extreme construction of the lower courts ruling, where one is seeking to see if possibly a ruling could conflict with a constitutional provision as distinguished from determining if the ruling can be met on some other grounds. The courts do not decide cases on constitutional grounds unless they cannot be decided on non-constitutional grounds, see Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 76 S. Ct. 663,667. There was no disqualifying affidavit filed as to any alleged bias or prejudice of the deputy commissioner as required by the Administrative Procedures Act, see 5 U.S.C. 556, formerly 1006, page 18a, appendix, if the claim is made that the deputy commissioner was biased or prejudiced.

However, the claim seems to be that the construction placed the statute creates the violation of the due process clause; that it should be construed and applied without regard to accomplishing the beneficial effects intended to be accomplished by the statute; in other words, the contention seems to be that due process requires mathematical certainty, which is not required, see Gibbs v. Burke, 69 S. Ct. 1247, 1249, 337 U.S.

775, 776 (dealing with the 14th amendment - Due Process Clause). Due Process means different things against different backgrounds,. "... Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed. See Betts v. Brady 316 U.S. 455,462; 62 S. Ct. 1252, 1256, overruled on other grounds by Gideon v. Wainwright 372 U.S. 335; 83 S. Ct. 792, but substantially followed as to the above quote.

The courts below, as indicated by cases cited in the opinion, as well as supported by cases cited by the deputy commissioner in his brief in opposition, insofar as the matters raised by petitioners are concerned, have followed the dictates of this court in requiring a liberal construction of the Longshoremen'

and Harbor Workers' Compensation Statute in order to achieve its beneficial purposes and it is believed that petition should be denied.

WHEREFORE, premises considered, Respondent Tugwell prays that the petition for writ of certiorari be denied.

Respectfully submitted,

(ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS
Attorney for Respondent
Paul L. Tugwell
617 Americana Building
Houston, Texas 77002
223-4601

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent Paul L. Tugwell in Opposition to the petition have been served upon each of the following: Solicitor General, Department of Justice, Washington, D. C., 20530; Solicitor of Labor, Washington, D. C. 20530, each by depositing two (2) copies in a United States Post Office or mailbox addressed to their post office address, airmail, postage prepaid; and upon Mr. Anthony J. P. Farriss, United States Attorney, 515 Rusk Avenue, Houston, Texas 77002, counsel for Respondent, R. J. Shea, Deputy Commissioner; and Mr. E. D. Vickery, Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, counsel for Petitioners Texas Employers' Insurance Association and Young & Company, by depositing in a United States Post Office or mailbox the same to each of them, United States Mail, postage prepaid, properly addressed to each of them at their respective post offices addresses, this the 17 day of May, 1969.

(ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS

Federal Rules of Civil Procedure, Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor. As amended Feb. 28, 1966, eff. July 1, 1966.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948.

Federal Rules of Civil Procedure, Rule 60. Relief from Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any

other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1958, eff. Oct. 20, 1949.

Federal Rules of Civil Procedure, Rule 43. Evidence.

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the

adverse party only upon the subject matter of his examination in chief.

(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific order of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it is offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensa-

tion. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court. Added Feb. 28, 1966, eff. July 1, 1966.

Federal Rules of Civil Procedure, Rule 49. Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as

may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

33 U.S.C. 914. Payment of Compensation.

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury

or death, and the grounds upon which the right to compensation is controverted.

Remaining portions of 33 U.S.C. 914 not pertinent to this case.

33 U.S.C. 919. Procedure in Respect of Claims.

(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

33 U.S.C. 922. Modification of awards.

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. Mar. 4, 1927, c. 509, 22, 44 Stat. 1437; May 26, 1934, c. 354, 5, 48 Stat. 807; June 25, 1938, c. 685, 10, 52 Stat. 1167; 1946 Reorg. Plan No. 2, 3, eff. July 16, 1946, 11 F.R. 7873, 60

Stat. 1095; 1950 Reorg. Plan No. 19, 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

33 U.S.C. 929. Record of Injury or Death.

Every employer shall keep a record in respect of any injury to an employee. Such record shall contain such information of disease, other disability, or death in respect of such injury as the Secretary may by regulation require, and shall be available to inspection by the Secretary or by any State authority at such times and under such conditions as the Secretary may by regulation prescribe. Mar. 4, 1927, c. 509, 28, 44 Stat. 1438; 1946 Reorg. Plan No. 2, 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat 1095; 1950 Reorg. Plan No. 19, 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

33 U.S.C. 930. Reports.

(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

(b) Additional reports in respect of such injury and of the condition of such employee shall be sent by the employer to the Secretary and to such deputy commissioner at such times and in such manner as the Secretary may prescribe.

(c) Any report provided for in subdivision (a) or (b) of this section shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made.

(d) The mailing of any such report and copy in a stamped envelope, within the time prescribed in subdivisions (a) or (b) of this section, to the Secretary and deputy commissioner, respectively, shall be a compliance with this section.

(e) Any employer who fails or refuses to send any report required of him by this section shall be subject to a civil penalty not to exceed $500 for each such failure or refusal.

(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section. Mar. 4, 1927, c. 509, 30, 44 Stat. 1439; June 25, 1938, c. 685, 11, 52 Stat. 1167; 1946 Reorg. Plan No. 2, 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

5 U.S.C. 556. Formerly 1006. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

..... On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case. .....

SUPREME COURT, U. S.

FILED

MAY 15 1969

JOHN F. DAVIS, CLERK

NO. 1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

YOUNG AND COMPANY, ET AL, *Petitioners*

v.

R. J. SHEA, DEPUTY COMMISSIONER OF LABOR, ET AL, *Respondents*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

E. D. VICKERY
GUS A. SCHILL, JR.
Counsel for Petitioners

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX OF AUTHORITIES

CASES	Page
Calbeck v. Strachan Shipping Company, 5 Cir. 1962, 306 F.2d 693, at p. 695, cert. den. 372 U.S. 954, 83 S.Ct. 950, 9 L.Ed. 2d 978 (1963)	4
Del Vecchio v. Bowers, 296 U.S. 280, at p. 286, 80 L.Ed. 229, at p. 233, 56 S.Ct. 190 (1935)	3, 4
Furlong v. O'Hearne, 144 F. Supp. 266, 271 (D.C. Maryland, 1966, aff'd 240 F.2d 958 (4 Cir. 1967)	4
John W. McGrath Corporation v. Hughes, 2 Cir. 1959, 264 F.2d 314, at p. 317, cert. den. 360 U.S. 931, 3 L.Ed. 2d 1545, 79 S.Ct. 1451 (1959)	4
LeBlanc v. Henderson, 5 Cir. 1962, 301 F.2d 482, at p. 484	4
Liberty Mutual Insurance Co. v. Gray, 9 Cir. 1943, 137 F.2d 926, at p. 928	4
Pillsbury v. Liberty Mutual Insurance Co., 9 Cir. 1944, 143 F.2d 807, at p. 809	4

UNITED STATES STATUTES	
33 U.S.C.A. §920	3, 4, 5

NO. 1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

YOUNG AND COMPANY, ET AL, *Petitioners*

v.

R. J. SHEA, DEPUTY COMMISSIONER
OF LABOR, ET AL, *Respondents*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners do not wish to unduly burden the Court with any lengthy reply and file this reply only because the Respondent-Deputy Commissioner's Brief in Opposition, with all due respect, does not even attempt to meet the principal question presented for consideration by this Court:

> Are the employer and its compensation carrier entitled, under the due process clause, to a fair and impartial adjudication of their rights under the Longshoremen's Act by an impartial trier of the facts?

Respondent's Brief in Opposition is directed solely to the merits of the collateral estoppel question, which as we pointed out in the Petition is of small significance when compared with the constitutional questions of due process. As it is clear that the holding of the Court of Appeals below that the doctrine of collateral estoppel did not apply was based solely on an alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" and against his employer, the constitutionality of such an alleged policy and whether it exists at all, are both questions which must be considered before the merits of the collateral estoppel question are even reached. What the Respondent's Brief in Opposition tries to do (apparently following the lead of the Court of Appeals below) is to completely ignore the serious constitutional questions involving the due process clause. We suppose Respondent thus hopes that this Court will do likewise in order that he can continue to issue compensation orders without meeting the most elementary requirements of the due process clause of a fair hearing and as an impartial trier of doubtful fact questions.

1.

The Respondent attempts to justify by implication only the alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" and against the employer by relying on the statutory pre-

sumptions in Section 920 of the Act.[1] In so doing, Respondent completely ignores and disregards the very limited effect of these statutory presumptions as stated by this Court:

> ". . . Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. *It never had and cannot acquire the attribute of evidence in the claimant's favor. It's only office is to control the result where there is an entire lack of competent evidence.* If the employer alone produces evidence which tends to support the theory of suicide, the case must be decided on that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof pro and con. . . ."[2] (Emphasis supplied)

Thus, the only function of these statutory presumptions, as this Court held in *Del Vecchio,* is to control the result where there is an entire lack of competent evidence. Once the substantial dispute on the question of injury arose in in the evidence before the Deputy Commissioner, the statutory presumption went completely and absolutely out of

---

1. 33 U.S.C.A. §920 reads in full as follows:

"§920. PRESUMPTIONS

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.
(b) That sufficient notice of such claim has been given.
(c) That the injury was not occasioned solely by the intoxication of the injured employee.
(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

2. *Del Vecchio v. Bowers,* 296 U.S. 280, at page 286, 80 L.Ed. 229, at page 233, 56 S.Ct. 190 (1935).

the case.[3]

The Court of Appeals below fully recognized the very limited nature of the statutory presumptions in Section 920, on which the Brief in Opposition relies so heavily in an attempt to persuade this Court not to consider the serious constitutional questions involving the due process clause. The Court of Appeals below recognized that these statutory presumptions did not support its alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" and against his employer when it succinctly stated:

> ". . . Under 33 U.S.C.A. §903(a), the claimant has the burden of proving all that is not presumed under Section 920. See *Eschbach v. Contractors, Pacific Naval Air Bases,* 7 Cir. 1950, 181 F.2d 860. Section 920 does not presume an injury so the claimant must prove its existence. *O'Hearne,* D. Maryland, 1960, 181 F. Supp. 368, 371".[4]

---

3. Althoug the *Del Vecchio* case involved the presumption against suicide contained in Section 920(d), it is clear that it applies to all of the presumptions in that section of the Act. It has been held expressly to apply to the presumption in Section 920(a) "that the claim comes within the provisions" of the Act which is the presumption on which the Respondent's Brief in Opposition relies in this case. See: *John W. McGrath Corporation v. Hughes,* 2 Cir. 1959, 264 F.2d 314, at page 317, cert. denied 360 U.S. 931, 3 L.Ed.2d 1545, 79 S.Ct. 1451 (1959); *Liberty Mutual Insurance Co. v. Gray,* 9 Cir. 1943, 137 F.2d 926, at page 928; *Pillsbury v. Liberty Mutual Insurance Co.,* 9 Cir. 1944, 143 F.2d 807, at page 809.

4. Appendix C, page 5C, Petition for Writ of Certiorari; 397 F.2d 185, at page 188. While the Court of Appeals below cited only two cases in support of these propositions, to the same effect is *Furlong v. O'Hearne,* 144 F.Supp. 266, 271 (D.C. Maryland, 1966, aff'd 240 F.2d 958 (4 Cir. 1967). Likewise the decisions also hold that the claimant has the burden of proof in establishing disability emanating from the accidental injuries. See: *Calbeck v. Strachan Shipping Company,* 5 Cir. 1962, 306 F.2d 693, at page 695, cert. denied 372 U.S. 954, 83 S.Ct. 950, 9 L.Ed.2d 978 (1963) and *LeBlanc v. Henderson,* 5 Cir. 1962, 301 F.2d 482, at page 484.

Thus, it is clear that the statutory presumptions in Section 920 of the Longshoremen's Act do not create or support to any extent any alleged "statutory policy" such as that announced by the Court of Appeals below. And even if they did such a policy would clearly be unconstitutional under the due process clause.

2.

Nor are we concerned on this petition with a question of depriving the deputy commissioner of his right to carry out the functions given to him by the Congress as the Brief in Opposition would attempt to lead the Court to believe. Rather we are concerned here with the question of the constitutionality of the process by which he arrives at his determination of doubtful fact issues. If, as the Brief in Opposition contends, there is such an alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the employee" and against his employer, on what basis can this exist constitutionally under the due process clause of the Fifth Amendment? Obviously, it cannot exist constitutionally unless a fair hearing by an impartial trier of the facts is no longer required by the due process clause.

We are certain that deputy commissioners under the Longshoremen's Act would very much like to have the burden and responsibility of determining difficult fact questions taken from their shoulders under such an alleged statutory policy. This would make their job extremely easy, if they were laboring under such a statutory policy, for once some doubt is created on a question, then they would be required by this alleged statutory policy under the holding of the Court of Appeals below to resolve that issue always in favor of the injured employee and always against the employer and its insurance carrier. Once doubt-

ful questions are raised the deputy commissioner would no longer be an impartial hearing officer, an impartial trier of the facts, but he would be bound by the alleged statutory policy to resolve these issues all one way and this even though he believed in his heart that the facts ought to be resolved in favor of the employer and its insurance carrier. Under the alleged statutory policy of the Court of Appeals below the deputy commissioners would no longer have any discretion to decide a doubtful fact question in favor of the employer or the insurance carrier—they would have to resolve all of them in favor of the injured employee.

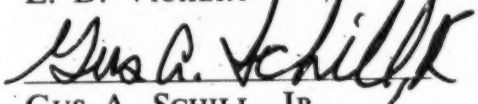
If this is not directly contrary to all our concepts of due process, it is impossible to imagine what type of proceeding could be devised which would violate the due process clause any more.

CONCLUSION

Petitioners respectfully urge this Court to grant their Petition herein in order that the important constitutional due process questions in administrative hearings might be fully considered by the court.

Respectfully submitted,

E. D. VICKERY



GUS A. SCHILL, JR.
Counsel for Petitioners

Of Counsel:
ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I certify that copies of this Petition for Writ of Certiorari were served on Mr. W. Jiles Roberts, Americana Building, Houston, Texas 77002, attorney for the Respondent, Paul Tugwell, and on the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, Mr. William D. Ruckelshaus, Assistant Attorney General, Mr. Morton Hollander and Mr. Ralph A. Fine, Attorneys, Department of Justice, Washington, D.C. 20530, on the Honorable Anthony J. P. Farris, United States Attorney, Mr. James R. Gough, Mr. Jack Shepherd and Mr. Carl Walker, Assistant United States Attorneys, P. O. Box 61129, Houston, Texas 77061, on Honorable Charles Donahue, Solicitor of Labor, Department of Labor, Washington, D. C., and on Mr. Alfred H. Meyers and Mr. Arthur Bolstein, attorneys for Respondents, R. J. Shea and Gerald Leavey, Deputy Commissioners, by mailing said copies to them at their last known addresses as shown above by first class mail, air mail to out of town addresses, on this the 13th day of May, 1969.

Of Royston, Rayzor & Cook